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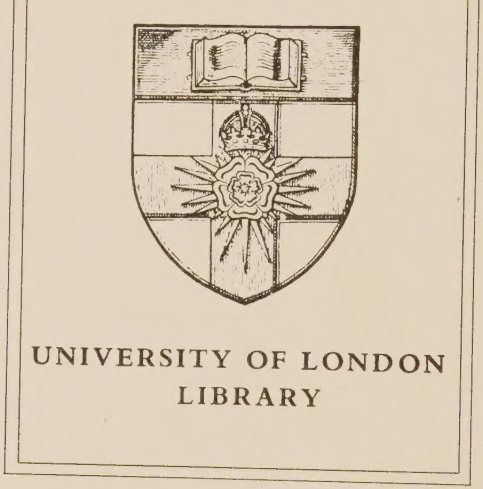

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THE NORTHERN IRELAND LAW REPORTS

1949

BELFAST :
PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR
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THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

FRANCIS NEWARK,

BARRISTER-AT-LAW.

1949

BELFAST:

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Judges and Law Officers

MEMORANDA.

1949.

26 Feb. The Rt. Hon. Sir Anthony Brutus Babington, a Lord Justice of His Majesty's Court of Appeal in Northern Ireland, resigned.

3 Mar. The Rt. Hon. Arthur Black, a Justice of His Majesty's High Court of Justice in Northern Ireland, was appointed to be a Lord Justice of Appeal of His Majesty's Court of Appeal in Northern Ireland in the place of the Rt. Hon. Lord Justice Babington, resigned.

3 Mar. Charles Leo Sheil, Esquire, K.C., was appointed to be a Justice of His Majesty's High Court of Justice in Northern Ireland in the place of the Rt. Hon. Mr. Justice Black, raised to be Lord Justice of Appeal.

11 Oct. The Rt. Hon. William Lowry, a Justice of His Majesty's High Court of Justice in Northern Ireland, resigned.

4 Nov. Lancelot Ernest Curran, Esquire, K.C., M.P., Attorney-General for Northern Ireland, was appointed to be a Justice of His Majesty's High Court of Justice in Northern Ireland, in the place of the Rt. Hon. Mr. Justice Lowry, resigned.

9 Nov. The Rt. Hon. John Edmond Warnock, K.C., M.P., was appointed to be Attorney-General for Northern Ireland in the place of Lancelot Ernest Curran, Esquire, K.C., M.P., raised to the High Court Bench.

14 Dec. The Rt. Hon. William Lowry, formerly a Justice of His Majesty's High Court of Justice in Northern Ireland, died this day.

Lord Chief Justice:

THE RIGHT HON. SIR JAMES ANDREWS, BART.

Lords Justices of Appeal:

THE RIGHT HON. SIR ANTHONY BRUTUS BABINGTON (to 26-2-49).

THE RIGHT HON. SAMUEL CLARKE PORTER.

THE RIGHT HON. ARTHUR BLACK.

Chancery Division:

THE RIGHT HON. ARTHUR BLACK (to 3-3-1949).

THE HON. LANCELOT ERNEST CURRAN (from 4-11-1949).

King's Bench Division:

THE RIGHT HON. WILLIAM LOWRY (to 11-10-1949).

THE HON. CHARLES LEO SHEIL (from 3-3-1949).

Attorney-General:

LANCELOT ERNEST CURRAN, ESQ., K.C., M.P. (to 4-11-1949).

THE RIGHT HON. JOHN EDMOND WARNOCK, K.C., M.P. (from 9-11-1949).

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ERRATA.

Page 50, footnote, and pages 50-59, running-titles and side-titles—for "King's Bench Division" read "Court of Appeal."

There are no pages numbered 161 and 162 in this volume. The error is in paging, and no matter has been omitted.

TABLE OF CASES REPORTED

IN THIS VOLUME

A.

Att.-Gen. for Northern Ireland *v.* Eastwood .. 41

B.

Baldrick, Graham *v.* .. 155
Bogle and Williamson, Sproule *v.* 134
Brennan and another *v.* Gale and another 178

E.

Eastwood, Att.-Gen. *v.* .. 41

G.

Gale and another, Brennan *v.* 178
Gardiner *v.* Gardiner .. 126
Graham *v.* Baldrick .. 155

K.

Kerr *v.* McNeill 19

M.

McCausland and others *v.* Young and others .. 49
McNeill, Kerr *v.* 19

R.

Robinson, Hampton, In the goods of 150

S.

Sproule *v.* Bogle and Williamson 134

W.

W., E. A. and M., Infants, *In re* 1

Y.

Young and others, McCausland and others *v.* 49

TABLE OF CASES CITED.

PAGE

A.

Admiralty Commissioners *v.* s.s. Volute 147
Aitken *v.* McMeckan 145
Allcard *v.* Skinner 121
Anderson *v.* Belfast Corporation 141
Anglo-Newfoundland Co. *v.* Pacific Steam Navigation Co. 147
A.-G. *v.* Ashbourne Recreation Ground 44
A.-G. *v.* Premier Line, Ltd. .. 44
A.-G. *v.* Sharp 44
A.-G. *v.* Wimbledon House Estate Co. 46
Avery *v.* L. N. E. Railway .. 182

B.

B. an infant, *In re* .. 3, 10, 13
Baker *v.* Courage 90
Bank of England *v.* Vaghane Bros. 162
Beard *v.* Beard .. 129, 131
Bentley *v.* Mackay .. 95, 96, 124
Blandford *v.* Blandford .. 130
Blows *v.* Chapman .. 28
Borwick, *In re* 61
Bostock *v.* Bostock 130
Boy Andrew (owners) *v.* St. Rognvald (owners) 144
Brady Minors, *In re* 10
Brookshank *v.* Smith 90
Butler *v.* Carter 94

C.

Campbell *v.* Campbell 9, 13
Campbell *v.* Kelly .. 134, 139, 145
Chambers *v.* Crabbe 71
Churchman *v.* Churchman .. 128
Clark *v.* Girdwood 124
Clavering *v.* Ellison .. 56, 97
Clayton *v.* Ramsden .. 58, 59, 99
Commissioners for Railways *v.* Brown 145
Cooke *v.* Cooke .. 126, 129

D.

Davies *v.* Mann 142, 143, 144, 147
Davies *v.* Powell Duffryn, etc., Co. 183, 184, 189
Davies *v.* Swan Motor Co. 142, 145
De Busche *v.* Alt .. 107, 118, 121
De Keyser *v.* British Railway Traffic, etc., Co. 170
Durant *v.* Durant 130

PAGE

E.

Edwards *v.* Carter 105
Ellis *v.* Hinds 32, 37
Emerson *v.* Woods .. 158, 171
Erlanger *v.* New Sombrero Phosphate Co. .. 91, 108
Evans, *In re* 60, 98
Evans *v.* Evans 130
Exmouth, *In re* Viscount .. 60

G.

Gaffney *v.* Dublin Tramways 143
Ginesi *v.* Ginesi 128
Greene *v.* Boyle 182

H.

Hoblyn *v.* Hoblyn 80, 95, 102, 123
Hoghton *v.* Hoghton 70, 74, 101, 105
Houghton *v.* Houghton .. 130

J.

James *v.* Couchman 124
Johnson *v.* Hill 178, 185, 190

K.

Kafton *v.* Kafton .. 17, 129, 131
Knowler *v.* Rennison .. 28, 35, 39

L.

Labrum *v.* Wilkinson 29, 30
Leeds, Duke of *v.* Amherst .. 107
Life Association of Scotland *v.* Siddall 89, 117
Lindsay Petroleum Co. *v.* Hurd 89, 117, 121
Lord Advocate *v.* Cruikshanks 163, 170, 177
Lovesy *v.* Smith .. 95, 104, 124

M.

M. *v.* M. 9
Mackellar *v.* Mackellar .. 13
May, *In re* (1917) 62
May, *In re* (1932) 62
March *v.* Russell 94
McKenna, *In re* 57
McLean *v.* Bell 143
Mitchell *v.* Homfray 72

N.

Newsome *v.* Newsome .. 130

O.

O'Hara, *In re* 12

TABLE OF CASES CITED

PAGE

P.

Patton *v.* Toronto Corporation 62
Praed *v.* Graham 180
Pym *v.* G. N. Railway .. 182

Q.

Quelch *v.* Collett 28

R.

R. (Magill) *v.* Crossan 25, 34
Remmington *v.* Larchin .. 170
Ridgeway *v.* Ridgeway .. 130
Robinson *v.* C. P. Railway .. 162
Ross *v.* McQueen 143
Royal Trust Co. *v.* C. P. Railway 182

S.

Sandbrook, *In re* .. 56, 61, 97
Sifton *v* Sifton 58
Sleigh, *In re* 13
Smelting Co. of Australia *v.* Commissioners of Inland Revenue 160
Stafford *v.* Stafford 89
Steele *v.* Gilliland 145
Stevenson *v.* Stevenson .. 16
Swadling *v.* Cooper .. 140, 147

PAGE

T.

Taff Vale Co. *v* Jenkins .. 180
Tegg *In re* 61
Tuck & Sons *v.* Priester .. 170
Tucker *v.* Bennet 103
Turner *v.* Collins 91, 102, 105

W.

Ward *v.* Laverty 3, 9
Warde *v.* Warde 16
Watt or Thomas *v.* Thomas 17
Watts, In the goods of 153, 154
Watson, In the goods of .. 154
Weld *v.* Petre 117
Whittall *v.* Kirby .. 19, 25, 26, 34
Williamson *v.* Thorneycroft .. 182, 187, 193
Winscom *v.* Winscom .. 130
Wright *v.* Vanderplank 72,90, 106, 108

Y.

Young *v.* Harris 94

CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

IN RE E. A. W. & M. W., INFANTS (1).

K.B.D. 1948.

June 29, 30.

C.A. 1948.

Oct. 13, 15.

Infant—Custody—Habeas Corpus—Husband and wife living apart—Wife having left matrimonial home—Conflicting claims of husband and wife—No evidence leading to any preference between them—Rights of father at common law—Paramount right of father to custody—Guardianship of Infants Act, 1886 (49 & 50 *Vict., c.* 27), *s.* 5.

A husband whose wife had left the matrimonial home taking with her the two children of the marriage applied to the court by way of habeas corpus for the custody of the children. There was no evidence to show that either party was unfitted to have the custody of the children or that the welfare of the children would be better served by placing them in the custody of one parent rather than the other.

Held by the Court of Appeal (Babington and Porter L.JJ. and Black J.), affirming the decision of the Divisional Court of the King's Bench Division (Andrews L.C.J. and Lowry J.) that a father's common law right to the custody of his infant children has not been completely abrogated by the Guardianship of Infants Act, 1886, section 5, for he can be deprived of this right only on proof that he is unfitted to have such custody or that the welfare of the children will be thereby imperilled ; and accordingly where a wife leaves the matrimonial home and wishes to obtain the custody of the children the onus is on her to make this proof.

(1) In the King's Bench Division before Andrews L.C.J. and Lowry J. : in the Court of Appeal before Babington and Porter L.JJ. and Black J.

K.B.D. 1948.

IN RE E. A. W. & M. W., INFANTS.

MOTION to make absolute a conditional order of habeas corpus.

The applicant husband and respondent wife were married in March, 1938. The only children of the marriage were two daughters, the subjects of this application, who at the time of the application were aged nine and seven. The husband was a doctor and Fellow of the Royal College of Surgeons, and was employed as a surgeon on the staff of a hospital. The wife was possessed of a private income of about £1,500 a year. The matrimonial home was a house which the husband had bought in 1947 at a cost of £5,000. Unhappy differences had existed between the husband and wife for a number of years, and there had been separations at different times by the wife leaving the husband, but these were followed by reconciliations. In April, 1948, the wife finally left the husband, taking with her the two children, and went to live at a bungalow which was her parents' home. The husband thereupon applied for and obtained a conditional order of habeas corpus directed to the wife ordering her to restore the two infants to his custody. The wife in her affidavit made allegations of jealousy, nagging, bad temper and inordinate sexual demands on the part of the husband. The husband denied these allegations and charged the wife with being sulky and failing to take any interest in his work.

Curran A.-G., *McCoy K.C.* and *M. W. Gibson* for the applicant.

Nicholson K.C. and *McQuitty* for the respondent.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J. [after stating the facts continued]: In these cases I feel that what the court ought always to do is to try to ascertain the principles which govern these matters, and to pay relatively less regard to the actual authorities, because it is almost impossible to find two cases of this character in which the facts

closely resemble one another. Looking, therefore, at the principles, I only wish to observe that since the case of the *Ward Minors* (1), which went from this court on appeal to the House of Lords—and, indeed, I may say for many years before that—it has become an indisputable principle that the paramount consideration in all these cases is the welfare and the happiness of the children; and Viscount Cave in that case used the expression—with which of course I express my respectful concurrence—that a sufficient case must always be made out for going contrary to the father's wishes. I am not going to refer further to the decision in this case of the *Ward Minors* (2) because we know well that the main consideration that the court had there to consider was the religious difference between the parties, and the fact there were three children, two of whom by the order of the King's Bench would be brought up in the Roman Catholic faith and the other one—the eldest—in the Protestant faith. The House of Lords, affirming the decision of our Court of Appeal, held that it would not be for the benefit of the younger children to separate them from their elder sister.

I have read all the cases cited to us; and the only one to which I wish to make any reference is the case of *In re B. an infant* (3); and I do so for two reasons. First of all, it is the most recent authoritative decision, and it contains the careful judgments of my colleagues, Black J. and MacDermott J., now Lord MacDermott. The second reason that I refer to it is that I find in it, as far as it is possible to do so in these cases, a very considerable amount of similarity between the facts of that case and the present; but in one respect there was a material difference—the child was a boy of eleven years. The headnote accurately sets out that "there was nothing in the conduct or wishes of either "parent to lead to any preference between them, or to "enable the court to say that either was unfitted to be "entrusted with the custody of the child." It was held that in the circumstances of the case the child's

(1) *In re Ward, Infants* [1924] 2 I.R. 19: reported in the House of Lords *sub. nom. Ward v. Laverty* [1925] A.C. 101.
(2) [1925] A.C. 101. (3) [1946] N.I. 1.

K.B.D. 1948.

IN RE E. A. W. & M. W., INFANTS.

ANDREWS L.C.J.

welfare would best be served by restoring him to the custody of his father.

Now, in giving judgment Black J. emphasised and underlined what I have already said is the governing principle in this case, that is, that the paramount consideration is the welfare of the children ; but he pointed out that having regard to section 5 of the Guardianship of Infants Act, 1886, the court must also take into consideration the conduct of the parents and the wishes of both parents, the mother as well as the father. Black J. then proceeded to face the problem that if even these considerations are evenly balanced, so that there is nothing in the conduct of either parent to lead to any preference between them, what view ought the court to take. The learned judge said that he had been unable to find any reported case on the point either in England or Ireland, but he referred to certain Scottish cases in which it was decided that, in the absence of any other consideration, it is the father who, prima facie, has the right to the custody of the children.

MacDermott J., as he then was, held in express terms, that the Guardianship of Infants Act, 1886 does not put spouses in the position of absolute equality, Its provisions, as to guardianship, he said, were so framed as to recognise that the husband had wider, if only slightly wider, rights ; and I think that his judgment upon this point may be taken as accurately summed up in the following passage (1) :—" While " the Act of 1886 went further than its predecessors of " 1839 and 1873 its effect on the common law position " was, to my mind, different only in degree. I do not " think it has abolished the father's former rights root " and branch. What it has done is to make them " subject to the very wide discretionary powers which " it confers on the Court. The eclipse is substantial, " but it is not total. There is, in my opinion, still a " residue of common law right in the father. It may " only be a vestige, and it cannot prevail against the " welfare of the child, but I think it is still there."

(1) Ibid 10.

In the present case, in which I am unable to find any sufficient evidence of preference between the parents, or in particular, that either of them is unfitted to be entrusted with the custody of the children, I go no further than to say that it appears to me that the onus of proving her case and her right to custody does lie upon the mother. As the mother left the house without having, in our opinion, sufficient cause for her doing so, and as she took the law into her own hands in taking the children away with her—and there is, I repeat, no allegation or suggestion that the husband had ill-treated his children or insulted them in any way that would have justified her in doing so—the case should, in my opinion, be considered in much the same way as it would have been if the wife had left the children in their own home, when she took her departure, and had then come to this court seeking to obtain our writ in order to obtain their custody. In our opinion in such circumstances the court would not have granted relief; and in our further opinion the proper place for these children for the reasons that I have mentioned is in their own home where they can be cared for and, I am satisfied, will be properly cared for by their father and their aunts and a housekeeper who is also in that establishment.

Accordingly, we propose to make an order that the conditional order should be made absolute. We will grant the custody of the children to the father. We feel at the same time that it is a case in which adequate access must be provided by the father in favour of the mother of these children, and in our opinion the access might perhaps be best given in general terms in the first instance, that is, that such access should be afforded to her " at all reasonable times ". Furthermore, we think that it would be proper that the children should go, and should be allowed to go, to stay with their mother for reasonably substantial periods of the year; and, subject to any argument we may hear to the contrary, we would say that they should go to her for a month in the summer time, and also during the Christmas holidays. We are anxious above all things that the mother should not be wholly deprived of her

K.B.D. 1948.

IN RE E. A. W. & M. W., INFANTS.

undoubted right of seeing these children ; and we say that not only in the interests of the children, but in the very sincere hope, which I repeat as my last word in this case, that these two children may help eventually to draw their parents closer to one another.

ANDREWS L.C.J.

We consider that there should be no costs in the case to either party.

LOWRY J. : I respectfully concur with the judgment which has just been given by my Lord and for the reasons which he has given.

Order absolute.

C.A. 1948.

The respondent appealed to the Court of Appeal (1).

Oct. 13, 15.

Sheil K.C., *Nicholson K.C.* and *McQuitty* for the appellant (respondent in the court below).

Curran A.-G., *McCoy K.C.* and *M. W. Gibson* for the respondent (applicant in the court below).

Cur. adv. vult.

BABINGTON L.J.

BABINGTON L.J. : This is an appeal from an order of the Divisional Court making absolute a conditional order for habeas corpus directing the mother of the infants to hand them over to the custody of their father.

The parents were married on the 2nd March, 1938, and there was issue two girls born on the 17th June, 1939, and the 31st March, 1941. Matrimonial differences arose between the husband and wife from an early period in their married life, which reached a climax on the 5th April, 1948, when the wife left her husband's home taking the two children with her. There had been several temporary separations prior to that date but the parties had been living together from the 10th November, 1947, until the wife left on the 5th April, 1948.

The husband says that whenever his wife and he had differences of opinion she invariably sought the support

(1) In the Court of Appeal before Babington and Porter L.JJ. and Black J.

of her family and particularly of her mother and that their personal differences were publicly aired as grievances and became a matter of family importance.

The wife alleges that her husband was bad tempered, constantly nagged at her and made unreasonable physical demands upon her. The possibility of taking matrimonial proceedings on this latter ground was considered in the wife's family, as appears from a letter written by her mother, apparently for the consideration of their lawyers, which was inadvertently placed in a case containing the children's clothes, and discovered by their father when they were restored to his custody under the order absolute of the Divisional Court. The existence of this letter was disclosed at the hearing when this court allowed further affidavits to be filed. No proceedings were instituted by the wife and the letter is only of importance because it supports to some extent the allegation of the husband that his wife was relving on her family to support her point of view.

The husband is a doctor and an F.R.C.S. He formerly had a lucrative private practice. He has a house for which he paid £5,000, and in 1947 he sold his practice and became Surgeon to a District Hospital. The wife is possessed of substantial means amounting to about £1,500 a year, and the husband complains that she often absented herself from their home and went to her parents' bungalow some five miles away, taking the children with her, and that she took little interest in his work as a medical practitioner.

The husband denies that he ever made inordinate physical demands on his wife or that he nagged her, and says he always tried to accommodate her. His home is well appointed and his sister, who is fully qualified in Domestic Science and holds a Diploma of Household and Institutional Management, and was lately on the matron's staff of a London hospital, has relinquished that position to run her brother's home and care for his children.

Stated shortly the wife's case is that her husband has given her sufficient cause to leave him because his violent temper and persistent nagging were driving her to distraction, that her mother has now transferred

C.A. 1948.

IN RE E. A. W. & M. W., INFANTS.

BABINGTON L.J.

the bungalow to her, so that she has a home of her own and she claims that it would have a very detrimental effect on the children's outlook on life and on their character to live in an atmosphere of strife, and that it would be a tragedy for them to be separated from their mother, to whom they look, as they have always done, with the most perfect confidence and trust.

The evidence is almost entirely directed towards establishing or refuting the allegations made by the wife against her husband. She left him, after nine years married life without an open breach between them, taking the children with her, and says she can no longer live with him. He says he is now and always has been most anxious that their home life should be renewed and that his wife should return. She has refused this request and stands by the claim made by her solicitors on the 13th April, 1948, that her husband should enter into a deed of separation under which she would have the custody of the children.

There is no satisfactory evidence other than inferences which might be drawn from the relationship between husband and wife to show that either wife or husband is unfitted to have the custody of the children, or to show that the children's welfare will be imperilled by placing them in the custody of either parent, but I am satisfied that they will be well housed and cared for in their father's home where they resided until removed by their mother in April, 1948. They have now been living there for over three months with their father and there is no evidence that they are not happy and contented. They have good educational facilities and friends in their immediate neighbourhood, and if we have regard to what is ultimately best in their interests as Lord Hunter said in *M. v. M.* (1), their prospects, in my opinion, are brighter under the care and influence of their father than they would be living with their mother, separated from her husband, where they might possibly be subject to influences which he says he has reason to believe are inimical to him.

The father is the natural guardian of his children and has a right to their custody until they are twenty-

(1) [1926] S.C. 778, 785.

one years of age : *Thomasset v. Thomassett* (1). This right has been recognized by statute and is implied in sections 2 and 3 of the Guardianship of Infants Act, 1886.

He may forfeit this right by his conduct, whereupon the mother of the infants may apply to the court and under section 5 the court may make such order as it may think fit as to the custody of such infants, having regard to the welfare of the infants, to the conduct of the parties and to the wishes as well of the mother as of the father.

The father is, therefore, entitled to the custody of his minor children unless it is shown that he is unfitted to be their sole guardian or that the welfare of the children will be thereby imperilled : *Ward v. Laverty* (2) : see per Viscount Cave L.C. The onus of establishing either of these allegations is on the person making them and therefore rests with the wife in this case. She has not shown that her husband is unfitted to be the guardian of the children, or that the welfare of the children will be imperilled by restoring them to his custody. She left her husband, taking the children with her, and counsel have argued that as section 5 says that the wishes as well of the mother as of the father must be had regard to by the court, she has the same right to control as her husband.

No authority was cited in support of this argument which is answered by the statute itself and the decisions in *Ward v. Laverty* (3) and the two Scottish cases *M. v. M.* (4) and *Campbell v. Campbell* (5) which are directly in point and show that the Guardianship of Infants Act, 1886, has not placed the husband and wife on an equal footing with regard to the custody of their children merely by enacting that regard is to be had to the wishes as well of the mother as of the father. I respectfully agree with these two decisions and the principles they affirm. The law does not permit a wife to walk out of the matrimonial home with her children and say that her wish to retain custody of them is as good as her husband's and that her act has put an end to

(1) [1894] P. 295.
(2) [1925] A.C. 101, 108.
(3) [1925] A.C. 101.
(4) [1926] S.C. 778.
(5) [1920] S.C. 31.

C.A. 1948.

IN RE E. A. W. & M. W., INFANTS.

BABINGTON L.J.

his rights unless she can prove that he is unfit to be their guardian or that their welfare would be better secured in her custody than in his.

In re B., an infant (1) was decided on this basis, and the argument addressed to the court in *In re B.* (1) was repeated to us, namely, that under section 5 of the Guardianship of Infants Act, 1886, the rights of the parties are now equal ; and a dictum of Andrews L.C.J., in *In re Brady Minors* (2) to this effect was strenuously relied on. I am not satisfied that the report of *In re Brady Minors* (2) gives the full context of the Lord Chief Justice's judgment or that he intended to lay down any such general rule. The issue was decided on the paramount ground of the children's welfare, and it was, therefore, unnecessary to consider the respective rights of husband and wife, and his judgment in this case in the Divisional Court when the conditional order was made absolute suggests that he may have been mis-reported.

In the present case the wife has not established that her husband has been guilty of conduct which disentitles him to the custody of his children, or that such custody would be detrimental to their welfare on other grounds, and the facts taken as a whole show affirmatively that their welfare would be better secured by restoring them to the custody of their father. From their point of view the best solution of this dispute would be that the parents should come together again, and it is more probable that this reunion will take place if the children remain in the custody of their father.

The decision of the Divisional Court was right and should be affirmed.

PORTER L.J.

PORTER L.J. : The question for decision in this appeal is whether the Divisional Court was right in granting the custody of the two children to their father. The parents were married on the 2nd March, 1938, and there are two children of the marriage aged nine years and seven and a half years. The father is a Fellow of the Royal College of Surgeons. For some years he

(1) [1946] N.I. 1. (2) (1943) 77 I.L.T.R. 68, 69.

had a large and lucrative general practice which he sold in the year 1947, and he now holds the important position of surgeon to a District Hospital. He purchased the house where he resides, about a year ago, for £5,000.

There appears to be little to choose between the parents as regards financial ability to provide for the children. The mother has a private income from her separate estate amounting to £1,500 per annum. She is now living apart from her husband in a bungalow which has been transferred to her by her mother since the case was heard by the Divisional Court.

For several years past there have been unhappy differences between the parents, which became so acute that the wife on several occasions left the family home taking the children with her and threatening that she would not live with her husband. These separations, however, were only temporary, but on the 5th April, 1948, she again left taking the children without the knowledge or consent of her husband, and on the 13th April, 1948, a letter from her solicitors announced that she had ceased to live with him and made proposals for a separation by consent and the custody of the children. The charges which she brings against him may be summarized thus: violent fits of temper, constant nagging, persistent acts of cruelty, and inordinate sexual demands which she says undermined her health and rendered life with him absolutely intolerable. So far is she from suggesting that he neglected or ill-treated the children in any way that in her affidavit of the 12th October, 1948, she says quite frankly that she is sure he is as anxious for their welfare as she is.

It was admitted by counsel for the wife that the husband, notwithstanding the charges she had made, was not disqualified from having the custody of the children, and that there was nothing to choose between the parents in their conduct and ability to secure the moral and physical welfare of the children, but he contended that the common law right of the father to the custody and control of the children had been abolished by the Guardianship of Infants Act, 1886,

C.A. 1948.

IN RE E. A. W. & M. W., INFANTS.

PORTER L.J.

section 5, and inasmuch as the paramount consideration now was the welfare of the infants, and the rights of the parents were equalized, the mother and not the father was the proper person to be entrusted with the upbringing of these two little girls. In support of this argument we were erferred to some general observations by Ashbourne L.C. in *In re O'Hara* (1), where he said that he would never deprive the mother of the duty and the right to direct, control and educate her child under twelve years of age except for the strongest reasons and that the circumstances must be very special which would prevent a mother from obtaining the custody of her child of only eleven years of age.

In that case, however, the contest was between a mother and a farmer to whom she had entrusted the girl under an agreement for adoption, and the observations, though appropriate to cases in which the claim of the mother is against a third party, are quite inapplicable to a contest between a father and a mother.

I cannot agree that the common law right of the father has been abolished or that the rights of the parents have been equalized by section 5 of the Guardianship of Infants Act, 1886. The paramount consideration in all these cases is, of course, the moral and physical welfare of the infant, but subject to that consideration the law, as stated by Sir Francis (now Lord) Merriman in vol. 17 of the Laws of England (Hailsham Edition) is that the father has a natural jurisdiction over and a right to the custody except that in the case of a daughter the right determines on her marriage under age, and the right of the father exists even as against the mother.

It should, moreover, be observed that this is the law in 1935, the date of the publication, that is to say notwithstanding the passing of the Guardianship of Infants Act, 1925, which enacted that neither spouse should have a superior right or claim to the other in cases regarding the custody and guardianship of infants. That Act applies to England and Scotland, but not to Northern Ireland.

There are several Scottish cases in which it is laid

(1) [1900] 2 I.R. 232, 235.

down that the Act of 1886 does not alter the position of the father as head of the family and guardian of his infant children during the joint lives of the parents and that he cannot be displaced from that position except on sufficient legal grounds: *Mackellar v. Mackellar* (1); *In re Sleigh* (2); *Campbell v. Campbell* (3).

In the latter case there was a dispute between the parents regarding the custody of their child a little girl, who was only two years and two months old—very much younger than the girls in the present case—and inasmuch as there was no disqualification alleged on the part of either spouse and no consideration affecting the welfare of the child to lead to either spouse being refused the custody, the Court decided that the father being by law the guardian of the child was entitled to the custody.

The question was fully discussed and the relevant authorities mentioned in *In re B. an infant* (4). Black J. without giving a definite decision on the question states that the Scottish cases afford useful guidance, while MacDermott J. (as he then was) holds quite definitely that even if the welfare of the child were equally assured whatever parent had the custody, the father would none the less be entitled to the custody.

The charges brought by the wife have been strenuously denied by the husband and no attempt has been made to corroborate or prove them in these proceedings. There are counter charges by the husband against the wife, which also remain unsubstantiated. Counsel for the wife has asked us to treat all these unproven charges as irrelevant in this case, and to consider only the interest of these two young girls to whom the mother was passionately devoted.

The Attorney-General for the husband argued that the onus was on the wife to satisfy the court that she was justified in removing the children from the paternal home and asked what right she had to remove the children if, as was suggested, the rights of the parents were equal. He also contended that it was most undesirable that the children should reside with their

(1) (1898) 25 R. 883.
(2) 30 S.L.R. 272.
(3) [1920] S.C. 31.
(4) [1946] N.I. 1.

C.A. 1948.

IN RE E. A. W. & M. W., INFANTS.

mother, where they would probably have their minds poisoned against their father by the relations of the wife, and that the return of the children to the father's home offered the possibility, and indeed the only possibility, of a reconciliation between the parents.

PORTER L.J

Children are entitled to the joint care and affection of both parents, and a wife who without sufficient cause breaks up the family life by deserting her husband and removing the children wrongs both her husband and the children. She deprives her husband of the consortium to which he is morally and legally entitled, and she deprives the children of their father's care and affection which is their natural right. If she had succeeded in proving the charges of cruelty I think she would have had a very strong and perhaps unanswerable claim to the custody of the children, because if it was the cruelty of the husband which drove her from the home it would be grossly unjust to penalize her by depriving her of the children and committing them to the sole custody of the wrong-doer. Since the charges of cruelty have not been substantiated I am of opinion that the wife acted wrongly in taking the law into her own hands and removing the children from the family home.

On a review of all the circumstances I agree with the decision of the Divisional Court that the welfare of the children requires that they should remain with their father in the family home, where they will have the benefit of the care and attention of their aunt, who appears to be very fond of them, and is well qualified by her training and experience to look after their wellbeing.

BLACK J.

BLACK J. : I also agree that the Order made by the King's Bench Divisional Court should be affirmed.

Although the matter came before the court upon the application of the father of the infants for the issue of a writ of habeas corpus, it is well established that in dealing with such an application it is the duty of the court to have regard to the considerations to which, under the provisions of section 5 of the Guardianship of Infants Act, 1886, it is directed to have regard upon

an application brought by the mother of an infant under that section. These considerations are (*a*) the welfare of the infant, (*b*) the conduct of the parents, and (*c*) the wishes as well of the mother as of the father. In the present case no point arises upon the last of these three considerations, as it is obvious that each of the parents ardently desires to have the custody of the children.

The primary and paramount consideration is, of course, the welfare of the infants themselves, interpreting the word welfare in the largest and widest sense of the term. In the present case the father and the mother are both very comfortably off financially and both appear to be genuinely fond of the children. So no matter to which parent the children are entrusted one can be reasonably sure that they will not lack material comfort and that they will have the affectionate care and companionship of one parent, though unfortunately not of both together. As regards the two residences, no criticism could be urged against the husband's house, and while the bungalow, which has recently been transferred to the wife by her mother, is probably somewhat less pretentious and commodious than the husband's house it has, nevertheless, not been suggested that it would not be a suitable and comfortable home. If the children's custody were entrusted to the wife they would, of course, have the advantage of a mother's care. On the other hand, the husband appears to have been exceedingly fortunate in persuading his sister—a lady, so far as one can judge from the affidavits, of the highest qualifications and suitability—to relinquish her position in a hospital for the purpose of undertaking the charge of his house and the care of his children. So far as the welfare of the children is concerned there does not appear to be anything resembling the striking preponderance either way which one so often finds in cases of this type. Where the scales seem to hang very evenly one inclines to say that the children should be allowed to remain in the place where they were brought up and which constituted the matrimonial home, unless, indeed, there is something in the conduct of one or other of the parents

C.A. 1948.

IN RE E. A. W. & M. W., INFANTS.

BLACK J.

which would lead the court to take a different view.

With regard to the conduct of the parents, which is the second of the considerations to which section 5 of the Guardianship of Infants Act, 1886, requires the court to have regard, we begin with the proposition that not only are husband and wife mutually entitled to each other's society but the children of the marriage are likewise entitled to the care of both their parents. Authority for this proposition, if authority is needed, is to be found, for example, in the judgment of Cottenham L.C. in *Warde v. Warde* (1). If the father and the mother part company, the one whose conduct is responsible for the parting is to blame. If the wife leaves the matrimonial residence without adequate cause she commits a wrong not only to her husband but also to the children of the marriage. On the other hand a husband may so comport himself that his wife becomes justified in saying that she will no longer live with him. If this is the position, and if she leaves him for adequate cause, it is not to be said that she can only do so under the penalty of having her children committed to the care of the husband, whose conduct is responsible for the parting (*Stevenson v. Stevenson* (2) : per Herschell L.C.).

In the present case it was the wife who left the matrimonial home. It is for her to justify her action : the onus clearly lies upon her of establishing to the satisfaction of the court that she had sufficiently grave and weighty reasons to warrant her taking this step. This she has sought to do in the affidavits which she has filed to resist her husband's application. I need not go through the various averments in those affidavits. Suffice it to say that the wife charges that her husband has been guilty of conduct towards her which is such as to render the continuance of married life with him unbearable. These allegations, however, the husband categorically denies. Where does the truth of the matter lie ? I find it very difficult to form any clear or confident judgment as to this on the evidence before us. We have only the assertions of the wife on the one side and the denials of the husband on the other. These questions of alleged cruelty between husband and wife

(1) (1849) 2 Ph. 786, 789. (2) (1894) 21 R. 96, 100.

are notoriously difficult to determine. When such allegations are made in divorce proceedings the court, as a rule of practice, attaches much importance to whether they are supported by corroborative evidence (*Kafton v. Kafton* (1)). In the present case we have only the wife's testimony as to her husband's alleged conduct; there is no outside evidence corroborating any of her allegations. Moreover, as has recently been emphasized in the House of Lords, cases between husband and wife constitute a class in which in order to form a sound judgment as to the truth of the matters in dispute it is of peculiar importance to see and hear the parties themselves in the witness box, and even within that class cases of alleged cruelty afford an especially strong example of the desirability of seeing and hearing the witnesses (*Watt or Thomas v. Thomas* (2): per Lord Thankerton and per Lord Simonds). In the present case the evidence is entirely upon affidavit. Neither the King's Bench Division nor this court has had the advantage of seeing the parties and of hearing them examined and cross-examined. In such circumstances one is very hesitant about forming any conclusion as to where the truth lies. So far as the affidavits go, either side's story may conceivably be the true story. And any impressions which one might be tempted to form from reading the affidavits might quite well be entirely upset after seeing and hearing the husband and the wife in the witness box. Accordingly, whatever might be the result of other proceedings in which the parties had to give their evidence orally and had to submit themselves to cross-examination—as to which I refrain from forming any conjecture whatever—my conclusion in the present proceedings is that I feel quite unable to pronounce myself as satisfied upon the evidence before the court that the wife has succeeded in discharging the onus of establishing that her husband's conduct was such as to justify her in leaving him and that the responsibility for the breaking up of the home lies at the husband's door.

(1) [1948] 1 All. E. R. 435. (2) [1947] A.C. 484, 488, 492.

C.A. 1948.

IN RE E. A. W. & M. W., INFANTS.

BLACK J.

In the result then as I have not been convinced that it would be in the interests of the children and for their well-being to remove them from the custody of their father, and as I have also not been satisfied on the evidence before us that it has been established that the blame lies upon the husband for the present unhappy state of affairs, I agree that the order appealed from should be affirmed.

Appeal dismissed.

Solicitors for the applicant : *John G. H. Wilson & Co.*
Solicitors for the respondent : *Cunningham & Dickey.*

J. McC.

KERR v. McNEILL (1).

C.A. 1948.

Oct. 25; Nov. 22.

Motor car—User on road—Vehicle driven by employee without driving licence—Policy of insurance not covering third-party risks in circumstances—Conviction—Disqualification for holding licence—Steps taken by employer to see that employee had licence—Reasonable belief that licence had been obtained—Special reasons for not imposing disqualification—Motor Vehicles and Road Traffic Act (Northern Ireland), 1930 (20 & 21 *Geo.* 5, *c.* 24), *s.* 6 (2).

The owner of a motor tractor was convicted under s. 6 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, of causing or permitting his employee to use the tractor on the highway without there being in force in relation to such user such policy of insurance or such security in respect of third-party risks as complied with the requirements of Part II of the Act. The policy of insurance held by the defendant excluded from its cover any driver who did not at the time of driving hold a licence to drive and the employee had no such licence. It was found that the defendant when engaging the employee a fortnight previously had learned that he had no licence, that he thereupon instructed him to obtain a licence and gave him time off and money for this purpose, that he never enquired whether the employee had obtained a licence, but that when he gave the employee instructions to drive the tractor on the occasion in question he believed that a licence had been obtained and that accordingly there was in force a policy of insurance covering the tractor while being driven by the employee, and that in these circumstances the defendant was not guilty of carelessness.

Held, by the Court of Appeal (Andrews L.C.J. and Porter L.J.; Babington L.J. dissenting) that these facts disclosed a "special "reason" for which the trial court could properly exercise its discretion under s. 6 (2) of the Act not to disqualify the defendant for holding or obtaining a licence.

Dictum of Goddard L.C.J. in *Whittall v. Kirby* [1947] K.B. 194, 200 examined and explained.

CASE STATED by the Recorder of Londonderry.

The defendant was prosecuted at Coleraine Petty Sessions on the 11th July, 1947, for causing or permitting his employee, Robert Platt, to use a motor tractor on the public highway without there being in

(1) In the Court of Appeal before Andrews L.C.J. and Babington and Porter L.JJ.

C.A. 1948.

KERR v. McNEILL.

force in relation to the user of the said motor tractor such policy of insurance or such security in respect of third-party risks as complied with Part II of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930. The defendant appeared personally and explained the facts to the resident magistrate. The resident magistrate convicted, imposed a fine of £3 and costs, and suspended the defendant's driving licence and disqualified him for holding or obtaining a driving licence for the period of twelve months. After the decision had been given and the defendant realised the seriousness of the penalty he instructed his solicitor who asked the resident magistrate to re-open the case. The resident magistrate re-opened the case and heard the solicitor but adhered to his previous decision.

The defendant appealed and the appeal came on for hearing at Coleraine Quarter Sessions on the 14th October, 1947. No evidence was called by either party on the hearing of the appeal before the Recorder, but the facts which were stated by the solicitor for the defendant were admitted by the solicitor for the complainant and found as follows :—

1. At 3-45 p.m., on the 27th May, 1947, Robert Platt, of Drumcroon, Coleraine, while driving a Fordson Tractor and Trailer No. I.W.7083 on a public road at Macleary in the district of Coleraine and County of Londonderry was stopped by two constables of the Royal Ulster Constabulary. He did not have any driving licence nor did he hold any such licence.
2. The defendant's policy of insurance expressly excluded from its cover any driver who did not at the time of driving hold a licence to drive, and while the said Robert Platt was driving the motor tractor there was not in force in respect of the tractor such policy of insurance or such security in respect of third-party risks as complied with the requirements of Part II of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930.
3. The defendant had engaged Robert Platt to work for him about a fortnight before the 27th May

and on engaging him the defendant had asked Robert Platt if he held a driver's licence and Robert Platt stated that he did not but led the defendant to believe that he had held one which had expired, whereupon the defendant told him to renew his licence and allowed him to leave his work early one day for the purpose of having photographs taken and getting the form of application lodged. He also advanced money to Robert Platt for this purpose.

4. On the 27th May the defendant was planting a field with potato seed and instructed Robert Platt to take the tractor and trailer out of the field and collect seed, and it was on this journey that the said Robert Platt was stopped by the constables.
5. The defendant had not enquired from Robert Platt if he had carried out his instructions and obtained a licence, but when he gave him instructions to drive the tractor on the 27th May he believed that Platt had carried out his instructions in view of the fact that he had permitted him to leave his work prior to the 27th May, 1947, and had advanced money for the purpose of obtaining a licence.

It was contended by the solicitor on behalf of the defendant that the defendant had reason to believe that Platt had followed his instructions given a fortnight earlier and that he did so believe and that he was so concerned with the work on hand on the 27th May that his failure to enquire from Platt if he had obtained a licence was reasonable and excusable.

It was contended by the Crown Solicitor for the complainant that a fortnight before the committal of the offence the defendant knew the circumstances; that the defendant had a fortnight in which to enquire from Robert Platt if he had carried out his instructions, and that his failure to so enquire was due to carelessness; and that following the observations of Goddard L.C.J. in his judgment in *Whittall v. Kirby* (1), a belief held as a result of carelessness could not amount to a

(1) [1947] K.B. 194.

C.A. 1948.

KERR v. McNEILL.

special reason within section 6 of the Act of 1930.

The Recorder was not satisfied that the defendant was guilty of carelessness in the circumstances and so held. He accepted the statement made by the defendant's solicitor and found as a fact that when on the 27th May, 1947, the defendant gave instructions to his servant, Robert Platt, to drive his tractor on the public road he did not know that Platt had not a driving licence at the crucial date but believed that Platt did have a driving licence, and consequently that whilst so driving that there was a policy of insurance covering the motor tractor while being driven by Platt; and thereupon while affirming the conviction and fine imposed by the learned resident magistrate he removed the suspension and disqualification imposed by the same order on the defendant.

The complainant thereupon asked the Recorder to state a case for the opinion of the Supreme Court of Judicature. The question raised in the case stated was whether the Recorder was right in law in holding that the belief held by the defendant constituted a special reason enabling him to exercise in the defendant's favour the discretion given to him by s. 6 (2) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, to order the removal of the suspension of the defendant's driving licence and disqualification for holding a driving licence imposed by the order of the resident magistrate.

Nicholson K.C. and *Harrison K.C.* for the appellant.
M. W. Gibson for the respondent.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J.: As the complainant in this case at petty sessions—George Paul Kerr—was the respondent before the Recorder of Londonderry and is the appellant in this Court, I shall for greater clearness refer to him throughout this judgment as the complainant. He is a District Inspector of the Royal Ulster Constabulary, and the defendant, William Cochrane McNeill, is a farmer.

The complainant prosecuted the defendant at Coleraine Petty Sessions under the provisions of section 6 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, for causing or permitting his employee, Robert Platt, to use a motor tractor on the public highway without there being in force in relation to the user of the said motor tractor such policy of insurance, or such security in respect of third-party risks, as complied with the requirements of Part II of the said Act. The resident magistrate imposed a fine of £3 and costs, suspended the defendant's driving licence, and disqualified him for holding or obtaining a driving licence for twelve months. On appeal the learned Recorder of Londonderry affirmed the conviction and fine, but removed the suspension and disqualification. No evidence was called before the Recorder, the facts being all admitted and found, so far as is material, as follows :—On the 27th May, 1947, Robert Platt was driving a Fordson Tractor and Trailer, the property of the defendant, on a public road, without possessing a driving licence, when he was stopped by two constables of the R.U.C. Platt had been engaged by the defendant to work for him about a fortnight before. When engaging him the defendant asked Platt if he held a driver's licence. Platt replied that he did not, but he led the defendant to believe that he had held one which had expired ; whereupon the defendant told him to renew his licence, and allowed him to leave his work early one day for the purpose of having photographs taken and getting the requisite form of application lodged. The defendant also advanced money to Platt for this purpose. On the said 27th May, the defendant was planting a field with potato seed, and instructed Platt to take the tractor and trailer out of the field and collect seed. It was on this journey that Platt was stopped by the constables. The defendant had not enquired from Platt if he had carried out his instructions and obtained a licence ; but, when he gave him instructions to drive the tractor on the occasion referred to, he believed, in consequence of the instructions previously given him, that Platt had carried out his instructions.

C.A. 1948.

KERR v. McNEILL.

ANDREWS L.C.J.

On the said 27th May the defendant held a valid policy of insurance against third-party risks in relation to the user of the said motor tractor, as required by Part II of the said Motor Vehicles Act, 1930; but such policy expressly excluded from its cover any driver who did not at the time of driving hold a licence to drive; and, accordingly, while Platt was driving the motor tractor on the occasion referred to—stated during the course of the argument to be a very short distance—the requisite policy of insurance was not in force.

The learned Recorder arrived at certain findings which in my judgment were intended to be, and in fact were, findings of fact; and he then set out the question of law for the opinion of this court. These facts were:—(1) That he was not satisfied that the defendant was guilty of carelessness in the circumstances; (2) that when, on the 27th May, he gave the instructions to Platt to drive the tractor he did not know that Platt had not a driving licence; (3) that he believed that he had such a licence, and consequently that there was a policy of insurance covering the motor tractor while being driven by Platt.

On these findings the learned Recorder, while affirming the conviction and fine, removed the suspension and disqualification; but stated this case for the opinion of the court as to whether he was right in law in holding that the belief so held by the defendant constituted a "special reason" enabling him to exercise in the defendant's favour the discretion given by section 6 (2) of the said Act of 1930, to order the removal of the suspension of the defendant's driving licence and disqualification for holding a driver's licence imposed by the order of the court of summary jurisdiction.

The section referred to, after providing for the imposition of a fine, or imprisonment, or both, enacts that a person convicted of an offence under the section should (unless the court for special reasons thinks fit to order otherwise) be disqualified for holding or obtaining a licence under section 3 of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, i.e., a driver's licence.

The question put to us by the Recorder is, and could only be submitted to us under section 26 (1) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, as a question of law—as the section states " for the opinion of the Supreme Court " on the point of law " ; and it is too well settled to be questioned, that findings of fact by the tribunal stating the case—in this case the Recorder—must be accepted by the Supreme Court where there is reasonable evidence to support them. In the present case—unfortunately as it appears to me—no evidence was called on behalf of either the complainant or the defendant ; but the conclusive character of findings of fact must apply with at least equal force when the statement made by the defendants' solicitor upon which they are based is accepted and acquiesced in without qualification of any kind by the solicitor for the prosecution. I have said that the failure to call or to insist upon evidence was unfortunate. I hold this view, not only because of the criminal character of the case, but also because there are several matters upon which it would have been desirable to have evidence, particularly in regard to Platt's failure to procure the licence which he was sent by the defendant to obtain. However, so far as this court is concerned, I can only say that in my opinion we are bound by the Recorder's finding in regard to the defendant's belief asserted by the defendant's solicitor and unchallenged by the prosecution ; and such belief, in the absence of any finding to the contrary, must be regarded as honestly and *bona fide* held by the defendant. It is upon the Recorder's findings of fact that the question of law is submitted, and it is upon such findings that I proceed to answer it.

I take it to be the law both in Northern Ireland and in England, as established by the cases of *R.* (*Magill*) *v. Crossan* (1), and *Whittall v. Kirby* (2), that a " special " reason " within the words of exception in section 6 (2) of the Act of 1930 is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence—a mitigating or extenuating circumstance, not amounting in law to a defence,

(1) [1939] N.I. 106. (2) [1947] K.B. 194.

C.A. 1948.

KERR v. McNEILL.

ANDREWS L.C.J.

yet directly connected with the commission of the offence, and one which the Court ought properly to take into consideration when imposing punishment. The principal argument, however, as I understand it, which was advanced to us on behalf of the complainant is that, in accepting this statement of the law in *Whittall v. Kirby* (1), Lord Goddard must be taken as declaring (1) that forgetfulness or carelessness of any kind on the part of the defendant could not amount to a "special reason" and that in the present case the defendant was guilty of carelessness in not asking Platt on the day of the offence and before he took the tractor on to the road if he had actually obtained his licence. When the passage referred to in Lord Goddard's judgment is examined closely I do not think it bears out the wide proposition contended for. Lord Goddard was in express terms directing his observations to a hypothetical case in which there was *no* policy. In such a case he said there must be a disqualification order unless there is *some mitigating circumstance*, and that mere forgetfulness or carelessness *in not taking out a policy* could not amount to a special reason. I respectfully agree with every word of this dictum. To hold otherwise—that a man could excuse himself from taking out a policy on the ground of his own forgetfulness or carelessness—would virtually nullify the provisions of the Act, for some such excuse would invariably be forthcoming. But the present case appears to me to be entirely different. Here the defendant discharged the duty imposed upon him of taking out a policy against third-party risks—a policy which was, it is admitted, in the usual form; and the irregularity which has arisen is directly consequent upon *Platt's failure to carry out his legal duty*, and to obey the instructions properly given to him by the defendant to renew his licence, all reasonable facilities for so doing being provided for him by being allowed off work and provided with money for the purpose. It is contended that he should have done more—that before instructing Platt to take the tractor out of the field on to the road on the 27th May he should have

(1) [1947] 1 K.B. 194,200.

asked him if he had carried out the order given to him some days before in regard to the renewal of his licence. No doubt it would have been wiser had he done so; but is not this which is so contended for really a counsel of perfection? Was it unreasonable for him to assume that his man, who received and accepted his instructions without demur, had done that which he was directed to do in regard to the renewal of his licence? Was he to assume that Platt was knowingly going to subject both himself and his employer to criminal prosecution? The learned Recorder held, as I have already stated, that he was not satisfied that the defendant was guilty of negligence in the circumstances; and, if I put to myself the test, not of what the ideal man ought to do, but of what a reasonable man might be expected to do, I have little doubt that I would have found as the Recorder did on this issue. If then this finding be accepted as binding on this court Lord Goddard's reference to carelessness ceases to have any application, and we are properly left to consider what he puts forward as the true test—whether in relation to this particular offence there is "some mitigating "circumstance." That, couched in the briefest language, is precisely what I stated to be the law, as I conceived it, in *R.* (*Magill*) *v. Crossan* (1)—a mitigating or extenuating circumstance, not amounting to a defence, yet directly connected with the commission of the offence, and one which the court ought to take into consideration when imposing punishment. The circumstances of this case appear to me to satisfy every requirement of this definition; for carelessness and guilty knowledge on the part of the defendant are expressly negatived by the learned Recorder in his findings, and belief (which, as I have said, must mean honest belief) is established. It is to this belief alone that the Recorder refers in the question submitted to this court as constituting a "special reason"; and in my opinion, if there be no conclusive authority to the contrary, such belief in the circumstances of the case amply justified him in holding the existence of a "special reason," and in removing the suspension and disqualification imposed by the magistrate's order.

(1) [1939] N.I. 106.

C.A. 1948.

KERR v. McNEILL.

ANDREWS L.C.J.

Cases were cited to us, however, which, it is contended, place limitations upon both the meaning and application of the provision in regard to "special "reasons."

It may be noted parenthetically in this connection that one rather remarkable result of such decisions has been that it was held in *Quelch v. Collett* (1), following the opinions expressed by Goddard L.C.J. and Humphreys J. in *Blows v. Chapman* (2), that circumstances, which do not amount to special reasons justifying the non-imposition of a disqualification order in the case of a conviction, may yet justify the dismissal of proceedings altogether under the provisions of the Probation of Offenders Act, 1907.

One of the cases relied upon on behalf of the complainant in support of the contention that the words "special reasons" should receive a narrow meaning is *Knowler v. Rennison* (3). The facts and circumstances of this case are, however, in my opinion so different from the present as to bear no real resemblance to it. I do not consider it necessary to refer to those facts in detail. Suffice it for me to say that Goddard L.C.J., who delivered the judgment of the court, when referring to it in the subsequent case of *Labrum v. Wilkinson* (4), said, that in *Knowler v. Rennison* (3), the assured had made no inquiry in regard to the meaning of his policy He had taken out a policy which covered the use of his motor-cycle while he himself and no other person was driving it. He allowed a friend to drive the motor-cycle, and there was an accident. In the circumstances he was not insured, and he admitted that he had not taken any steps to find out what was the effect of his policy. He had got the policy for which he applied, and he had no reasonable grounds for believing that it would cover the circumstances which actually occurred. Neither had he any grounds for believing that his friend had a policy in force which would provide protection. Unlike the present case he acted on an assumption without any reason or justification for so doing. The justices,

(1) [1948] 1 K.B. 478.
(2) (1947) 63 T.L.R. 575.
(3) [1947] K.B. 488.
(4) [1947] K.B. 816, 819, 820.

however, thought that he was an honest witness, and so accepted his statement that he believed his friend was insured, though he made no inquiry on the subject, and gave no grounds for his belief. On such facts I accept Lord Goddard's conclusions both that it would be most dangerous to hold that the fact that a man misapprehends the legal effect of his policy would be a special reason ; and, further, that belief, however honest, cannot be regarded as a special reason unless it is based on reasonable grounds. What I do take exception to is the endeavour to apply these propositions to the present case, in which, in my opinion, the defendant, when he found that Platt had not a licence, took all reasonable steps to ensure that he did get a licence. Had Platt done what he was told to do the defendant would have been effectively protected by an insurance policy against third-party risks when Platt was driving. The defendant's only assumption on which he founded his belief in this case was that Platt had done that which he had been told to do, and that which it was his duty to do in order to avoid the commission of a criminal offence. Whilst admittedly such assumption and belief do not constitute a defence, may they not, if honestly held, be regarded as mitigating circumstances when measuring and imposing punishment ?

If it be said that the circumstances of this case do not warrant the holding of the existence of special reasons because the defendant did not do all that he might have done, namely, inquire subsequently from Platt if he had obtained the driving licence which he had been told and sent to get, I would reply that his omission was no more serious than was that of the defendant in *Labrum v. Wilkinson* (1), whom the court excused from not having read his policy of insurance, which, had he done so, would have shown him that he was not protected. The court so excused him on the simple ground that he would naturally expect that his policy would follow the terms of his prior cover-note which in fact did protect him. Was it any more unreasonable on the part of the present defendant in the circumstances of this case to expect that Platt

(1) [1947] K.B. 816.

C.A. 1948.

KERR v. McNEILL.

ANDREWS L.C.J.

would do what he had been ordered to do ? It is impossible, as it seems to me, in the face of this authority to say that the court cannot find the existence of a "special reason" unless every step has been taken by the party charged to ascertain not only all material facts but also his true legal position. The farmer has many difficulties to contend with in these days of controls, licences, orders and regulations. He is neither a lawyer nor an insurance agent ; and in my opinion we would be doing a grave injustice to a most deserving, but much harrassed, section of the community if for such a purely technical offence as the present—ordering his tractor which he thought was insured to proceed a few yards along the public road on a single occasion—he was virtually to be deprived of the use of that tractor for the period of twelve months.

I do not find it necessary to add anything further than once again to quote from the judgment of Lord Goddard in *Labrum v. Wilkinson* (1). who, after reviewing the facts and legal position, said : "In these "circumstances I am not prepared to say that there "was no evidence on which the recorder could come "to the conclusion that there was a 'special reason'." That is precisely the view which I take upon the special facts of the present case. It was within the competence of the learned Recorder to find as he did ; and, if so, it is not for this court, whose function is only to determine the question which he has properly submitted to us as one of law, to interfere with a discretion judicially exercised. For these reasons I am of opinion that the question so submitted to us should be answered in the affirmative, and that the defendant should have his costs of the case stated measured at twenty guineas.

BABINGTON L.J.

BABINGTON L.J. : This case is stated by the Recorder of Londonderry under section 26 (1) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935.

(1) [1947] K.B. 816, 820.

The defendant was prosecuted before a resident magistrate under section 6 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, for causing or permitting his employee, Robert Platt, to use a tractor on the public highway without there being in force in relation thereto a policy of insurance in respect of third-party risks, as required by the statute. He admitted that he had authorized Platt to drive his tractor on the highway without being licensed, which was an offence under section 3 of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, and he thereby became involved in a further offence under section 6, sub-sections (1) and (2), of the Motor Vehicles and Road Traffic Act, 1920, because although he held a policy of insurance against third-party risks, as required by that section, it did not cover him while his tractor was being driven by an unlicensed driver. He was, therefore, convicted on this charge and disqualified under section 6, sub-section (2) from holding or obtaining a licence for a period of twelve months. This disqualification is imposed by the statute unless the court for "special "reasons" thinks fit to order otherwise.

The facts were not presented in evidence when the case came before the Recorder, as they had been before the resident magistrate, nor does it appear whether the resident magistrate rejected the facts relied on as "special reasons" because he did not believe the defendant, or because he thought they could not in law constitute "special reasons."

Before the Recorder the latter was the only issue. The complainant, though he could have insisted on the evidence being given again and on his right to cross-examine the defendant, did not do so but admitted the facts as stated by the defendant's solicitor, possibly because they did not differ from the facts presented to the resident magistrate; which he was not in a position to challenge.

These facts, as set out in the case stated, show that the defendant had engaged Platt a fortnight before the date of the alleged offence and asked him if he held a

C.A. 1948.

KERR v. McNEILL.

BABINGTON L.J.

driver's licence. Platt said he did not, but led the defendant to believe that he had held one, and the defendant then told him to renew it and allowed him off work to have photographs taken and to get a form of application lodged. He also advanced him money for this purpose. He did not enquire whether Platt had carried out his instructions or obtained a licence, but he believed that he had done so. On these facts the Recorder says :—

> " I was not satisfied that the appellant was guilty " of carelessness in the circumstances and so held. I " accepted the statement made by the appellant's " solicitor and found as a fact that when on 27th " May, 1947, he gave instructions to his servant, " Robert Platt, to drive his tractor on the public " road he did not know that Platt had not a driving " licence at the crucial date, but believed that Platt " did have a driving licence, and consequently that " whilst so driving that there was a policy of insur- " ance covering the said motor tractor while being " driven by Platt, and, thereupon, while affirming " the conviction and fine I removed the suspension " and disqualification imposed by the same order on " the appellant and the question for the Court is " whether I was right in law in holding that the " belief so held by the appellant constituted a " special reason under the statute.".

The defendant's counsel argued that the Recorder's findings of fact are binding on this court but when examined they are, in my opinion, either irrelevant or arrived at without evidence to support them. The defendant's want of knowledge of the fact that Platt had no licence is irrelevant. It was his duty to see that his driver had a licence. This duty is mandatory and failure to perform it cannot be excused by alleging ignorance, and his belief that Platt was licensed is unsupported by evidence. The defendant had no knowledge on which to found any such belief, and if he held it in fact his belief was not based on any reasonable grounds. He says he gave Platt orders to take out a licence but he does not say that Platt promised to do so or that he said he had done so, and as the

defendant made no enquiries as to whether he had done so or not, the only conclusion that can be reasonably reached is not that the defendant believed that Platt had taken out a licence but that he believed that Platt would obey his orders, which is a very different proposition.

The findings of the learned Recorder cannot, therefore, be supported on the evidence and on this ground the answer to his question should be " No ".

The Recorder has found that the defendant was not guilty of carelessness, but this finding is also unsupported by any evidence. The duty was upon him and by allowing his tractor to be driven by Platt he was undoubtedly guilty of carelessness unless he could show that he had taken all reasonable steps to ensure that Platt had a licence. To take steps which might or might not be sufficient to discharge his duty in this respect will not excuse him, and he was not entitled to assume, contrary to the facts, that it had been performed. The facts found by the Recorder distinguish this case from *Ellis v. Hinds* (1), to which Porter L.J has drawn my attention since the close of the arguments.

This disposes of the " special reasons " relied on without reference to authority, but both on principle and on the authorities mere belief that the duty has been performed cannot amount to special reasons unless the defendant has real grounds for his belief, which he cannot have unless he has taken adequate steps either to perform it or to see that it *has been performed.* Default cannot be excused by the defendant giving an order and then assuming that it has been obeyed. Having regard to the serious conse quences which may result to other passengers on the highway from its non-performance, and to the mandatory terms of the statute the failure to perform the duty, and the special reasons relied on for not having done so, must be more cogent than this very casual excuse.

The authorities support this view. Section 6 (2) of the Act of 1930 first came under review in this Court

(1)[1947] K.B. 475.

C.A. 1948.

KERR v. MCNEILL.

BABINGTON L.J.

in *R.* (*Magill*) *v. Crossan* (1). In that case the defendant, a motor agent, was testing a motor cycle which he was repairing by riding it on the highway. The owner of the machine held a policy of insurance which covered himself but not the defendant, who was accordingly convicted under section 6 (1). The resident magistrate refused to disqualify the defendant, holding that the defendant required his licence for his business and that this constituted a "special reason" within sub-section (2).

This court, on a case stated, reversed the decision of the magistrate, holding on general principle, that the "special reason" relied on would also be a special reason in all similar cases, and that the act only contemplates reasons special to the cases under consideration. Andrews L.C.J., in his judgment, adopted a statement by Goddard L.C.J. to the magistrates assembled at the Summer Assizes for Essex in 1937 to the same effect. The point whether the retention of the defendant's licence was required for his business again came before the Divisional Court in England in *Whittall v. Kirby* (2), and the decision in *Crossan's Case* (1) was followed. These two cases are not, on their facts, directly in point, but Lord Goddard suggests further limitations on what may constitute "special circumstances." He says (3) :—"For myself, "I would say that I strongly incline to the opinion "that a person who drives or causes or permits a "vehicle to be driven when there is no policy in force "must be disqualified, unless the court can find in "relation to the particular offence some mitigating "circumstance, and that mere forgetfulness or care-"lessness in not taking out a policy could not amount "to a special reason."

This dictum, with which I respectfully agree, puts the decision in *Crossan's Case* (1) a step further and rules out forgetfulness or carelessness as being "special "reasons."

In view of this decision, which was cited to the Recorder, the defendant could not rely on his own

(1) [1939] N.I. 106.
(2) [1947] K.B. 194.
(3) [1947] K.B. 194, 202.

forgetfulness or carelessness, and he cannot improve his position by throwing the onus of complying with the statute on Platt and substituting the forgetfulness or carelessness of Platt for his own, since the onus of complying with the statute was on him and he was responsible for the acts and omissions of his servant. Lord Goddard amplified this view in *Knowler v. Rennison* (1). The facts there approximated very closely to those in the present case. The respondent was convicted under the section of the English Act corresponding to section 6 of our Act of 1930, for causing his motor-cycle to be used without there being in force in respect thereof a policy of insurance covering third party risks. The motor-cycle was being driven by a friend who had had a policy of insurance which had lapsed, and the respondent, who was riding on the pillion seat, had a policy which did not cover third-party risks when the machine was being driven by another person. The magistrates exercised their discretion and refused to disqualify the respondent from holding or obtaining a licence for twelve months on the ground that his belief that his friend had kept his policy in force and that the machine was covered either by his own or his friend's policy constituted a "special reason."

This was reversed by the Divisional Court and the disqualification re-imposed, and Lord Goddard L.C.J. says : "Belief, however honest, cannot in our opinion "be regarded as a special reason, unless it is based on "reasonable grounds. It could hardly even be sug-"gested that forgetfulness to renew a policy could be "a special reason, and indeed this court said in "*Whittall v. Kirby* (2) that it could not. Can, then, a "man who has forgotten the renewal date of his policy "and drives in the honest belief that his policy is still "current, be in a worse position than one who having "a current policy, believes it covers him in a particular "state of circumstances when it does not ? It seems "obvious they are both in exactly the same position." And again : "We cannot hold that a belief founded on "no reasonable ground can constitute a special reason."

(1) [1947] K.B. 488, 494, 495. (2) [1947] K.B. 194.

C.A. 1948.

KERR v. McNEILL.

BABINGTON L.J.

And: "Considering that he never even asked the "question we cannot possibly accept his belief on this "matter as a special reason."

These considerations, with which I fully agree, apply precisely to this case. The defendant forgot or omitted to see that Platt took out a driving licence. This invalidated his policy of insurance and he was, therefore, in the same position as if he had forgotten to take out a policy. His belief that Platt had a licence was not based on any reasonable ground as he never asked Platt whether he had taken out a licence or not and Platt never said he had. The defendant, therefore, had no grounds for his belief, and the Recorder should not have accepted such alleged belief as a special reason.

Knowler v. Rennison (1) was distinguished in *Labrum v. Wilkinson* (2) on the ground that the defendant was deceived by his Insurance Company into believing that his policy covered him when in fact it did not. That decision does not help the defendant here who was in no way misled by any outside agency, though he may have misled himself, but it suggests that some factor over which the defendant has no control or for which he is not himself responsible and which can reasonably be said to have affected his mind at the time the offence is committed must be present to constitute a "special "reason," as might have been the case here if Platt had led the defendant to believe that he had taken out a licence.

The answer to the question submitted should, in my opinion, be "No" and the disqualification imposed by the resident magistrate restored.

PORTER L.J.

PORTER L.J.: William Cochrane McNeill was charged at the Coleraine Petty Sessions under section 6 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, with causing or permitting his employee, Robert Platt, to use a motor tractor on the public highway without there being in force in relation to the user of the motor tractor such policy of insurance or other security in respect of third-party risks as complied with the requirements of Part II of the said Act

(1) [1947] K.B. 488. (2) [1947] K.B. 816.

He was convicted and fined and the resident magistrate ordered his driving licence to be suspended and disqualified him for holding or obtaining a driving licence for the period of twelve months from that date.

On appeal the learned Recorder of Londonderry affirmed the conviction and fine but removed the suspension and the disqualification, and the question for our decision is whether the Recorder was right in so doing.

I am not satisfied that he was rightly convicted. It seems to me that he might have had a perfectly good defence because the policy under the heading of General Exceptions covers the case of an unlicensed driver " who has held and is not disqualified for holding " or obtaining such a licence " : see *Ellis Ltd. v. Hinds* (1). That, however, is not a matter with which we can deal on this case stated.

No evidence was called on the hearing of the appeal but the facts as stated by McNeill's solicitor were admitted by the prosecution and we are of course bound by those facts as set out by the Recorder.

McNeill had engaged Platt to work for him about a fortnight before the date of the offence and had then asked him if he held a driver's licence, and when Platt told him that he had held one which had expired, McNeill told him to get his licence renewed and allowed him to leave his work early one day for the purpose of having his photograph taken and getting his form of application lodged, and he also advanced Platt money for that purpose. Unfortunately he never asked Platt if he had got the licence, and when he directed Platt to drive the tractor he did not know that Platt had no driving licence but, as the Recorder has found, he believed that Platt had the licence at the time he directed him to drive the tractor.

The contention of the prosecution was that McNeill had a fortnight to inquire if Platt had the licence, that his failure to inquire was due to thoughtlessness or forgetfulness, and that a belief formed in this way though it might be honestly held was not a reasonable belief, and therefore could not be a " special reason " within the meaning of section 6 (2) of the Act of 1930.

(1) [1947] K.B. 475.

C.A. 1948.

KERR v. McNEILL.

PORTER L.J.

In support of this argument Counsel cited *Whittall v. Kirby* (1) and *Knowler v. Rennison* (2); and he also referred to *R. v. Crossan* (3) in which Andrews L.C.J. laid down the rule which is now generally accepted as the governing principle in determining what is a "special reason" for not imposing the penalty of suspension and disqualification.

The Recorder states that he was not satisfied that McNeill was guilty of carelessness in the circumstances and he so held. He further found as a fact that at the time when he directed Platt to drive the tractor he believed that Platt did have a driving licence and that there was therefore a policy of insurance covering the tractor while it was being driven by Platt, and accordingly while affirming the conviction and the fine he removed the suspension and the disqualification. It is well settled that neither negligence nor forgetfulness nor ignorance of the law would justify the court in holding that there was a "special reason" for refraining from imposing the disqualification, but when an employer has given his servant proper instructions as well as a suitable opportunity and the money necessary to obtain a driving licence, and the court finds that he believed that the servant had carried out his instructions and did obtain a licence, and also that there was no negligence on the part of the employer, I think that his belief was based upon reasonable grounds and should be considered a reasonable belief in the circumstances.

Of course McNeill should have ascertained that Platt had procured his licence before he ordered him to drive the tractor, and it is therefore urged that inasmuch as he did not do all that a reasonably prudent man ought to have done to ensure compliance with the law, there is no "special reason" why the disqualification should not be imposed.

This argument affords a good example of a *non sequitur*. It does not follow that there cannot be a "special reason" if a person has not done all that he ought to have done. The provision concerning a "special reason" comes into operation only where

(1) [1947] K.B. 194.
(2) [1947] K.B. 488.
(3) [1939] N.I. 106.

there is an offence, which necessarily implies that the accused had not done all that he ought to have done, and the real question is whether there is anything in the mind or conduct of the accused or in the circumstances connected with the offence which would tend to mitigate or extenuate his guilt to such an extent as to justify the court in holding that there was a special reason for not imposing the penalty of suspension and disqualification.

Mens rea is not an essential ingredient of the offence of which McNeill was convicted, and the provision in question appears to have been inserted for the purpose of enabling the court to exercise a dispensing power in those cases where the law was broken not wilfully but in circumstances which shewed that there was a degree of guilt which could appropriately be punished by a fine without the severe penalty of disqualification.

Knowler v. Rennison (1) was cited as a decision in favour of the prosecution, but it should be observed that when that case came before the High Court it was remitted for further information as to the grounds on which the respondent based his belief, and that the appeal committee replied *that the respondent did not give any grounds for his belief*, but they thought he was an honest witness and accepted his evidence as to his belief. The respondent neither informed himself of the terms of his policy nor did he seek any advice as to what risks the policy covered. In fact according to the evidence he did nothing at all and it was therefore held that he had no reasonable ground for believing that the policy covered something which it did not cover. I do not see how the court could possibly have reached any other conclusion.

The present case is quite different. Here we have a person who by word and by deed manifests his intention to comply with the law. He gives his servant specific instructions and actually advances him money for the purpose of obtaining the driving licence. I think these were reasonable grounds for his belief. We have no information as to why the licence was not obtained, but it is admitted that McNeill believed that the driver

(1) [1947] K.B. 488.

C.A. 1948.

KERR v. McNEILL.

PORTER L.J.

held the licence at the time when the offence was committed and as the Recorder has found that there was no carelessness on McNeill's part, I am of opinion that there were extenuating or mitigating circumstances in the case, that these circumstances constitute a "special reason" and that the question put to us by the Recorder should be answered in the affirmative.

Appeal dismissed.

Solicitor for the appellant : *Chief Crown Solicitor.*
Solicitors for the respondent : *Macaulay, O'Neill & Martin.*

J.McC.

ATTORNEY-GENERAL FOR NORTHERN IRELAND v. EASTWOOD (1).

Ch.D. 1948.

June 22; July 2.

Emergency Legislation—Control of Building Operations—Works unlawfully undertaken without licence—Power of court to grant mandatory injunction—Defence (General) Regulations, 1939 (*S. R. & O.*, 1939, *No.* 927), *reg.* 56*A*.

Regulation 56A of the Defence (General) Regulations, 1939, which makes unlawful, subject to certain exceptions, the carrying out of any work done in the construction, reconstruction, etc. of a building without a licence therefor granted by the Minister does not make it a continuing offence to retain or continue in enjoyment of work which has been unlawfully done without licence. Accordingly where a defendant was undertaking the reconstruction of a building in breach of the regulation the court granted an injunction to restrain him from carrying out further work, but refused a mandatory injunction to compel him to demolish such work as has already been carried out.

ACTION by the Attorney-General for (1) a declaration that the defendant had committed and continued to commit a breach of regulation 56A (2) of the Defence (General) Regulations, 1939, by carrying out certain building operations without a licence, (2) an injunction restraining the defendant from carrying out any further work in breach of the regulation, and (3) an injunction directing the defendant to demolish such work as he had carried out in breach of the regulation.

On the 1st June, 1948, the court granted ex parte an interim injunction and gave leave to the plaintiff to serve with the writ of summons a notice of motion returnable on the 7th June, 1948, for an injunction to restrain the defendant until the trial of the action or further order from carrying out or continuing to carry out the building operation referred to without the requisite licence.

(1) In the Chancery Division before Black, J.

Ch. D. 1948.

ATTORNEY-GENERAL FOR NORTHERN IRELAND v. EASTWOOD.

The motion was for an order (*a*) restraining the defendant, his servants, agents and workmen, from carrying out or continuing to carry out any work of construction, reconstruction, alteration, decoration or repair of a building at Molesworth Street, Cookstown, in the County of Tyrone, without a licence as required by regulation 56A (2) of the Defence (General) Regulations, 1939, until the trial of the action or further or other order, and (*b*) directing the defendant to demolish such work as he had carried out in breach of regulation 56A (2) as aforesaid.

It was agreed by counsel for the plaintiff and defendant that the hearing of the motion should be treated as the trial of the action.

Lowry for the plaintiff.

Agnew for the defendant.

Cur. adv. vult.

BLACK J.

BLACK J.: By paragraph 2 of regulation 56A of the Defence (General) Regulations, 1939 (as amended by S. R. & O., 1945, No. 502) it is provided that subject to certain exceptions not relevant in the present case the carrying out in the United Kingdom of any work done in the construction, reconstruction, alteration, demolition, repair or decoration of a building shall be unlawful except in so far as there is in force therefor a licence granted by the Minister. But the paragraph provides that the Minister may by order authorise the carrying out of such work without a licence within such limits of cost as may be specified in the order.

By the Delegation of Emergency Powers (Ministry of Finance for Northern Ireland) Order, 1945 (S. R. & O., 1945, No. 789), made in pursuance of paragraph (1) of regulation 102A of the Defence (General) Regulations, 1939, the power to make orders under regulation 56A so far as relates to Northern Ireland was delegated to the Ministry of Finance. And by the Control of Building Operations (Northern Ireland) Order, 1945 (S. R. & O. (N.I.), 1945, No. 88), it was

provided that without a licence from the Ministry under paragraph (2) of regulation 56A work might be carried out on any single property if the cost of the work together with the cost of any other such work carried out on that property during the preceding twelve months does not exceed £100.

In the present case the Attorney-General alleges that the defendant has been carrying out work in the construction, reconstruction, alteration, decoration and repair of a building at Molesworth Street, Cookstown, without a licence from the Ministry and in breach of the provisions of regulation 56A (2).

In the affidavits filed in support of the present application it is averred that during the past few months the defendant has been carrying on certain building operations at the above-mentioned premises in Cookstown, designed apparently to convert an old building into a cinema theatre. It is also averred that these operations have been carried out without any licence under regulation 56A and that the cost of the work is greatly in excess of £100. Moreover, it is averred that on more than one occasion the defendant was warned by officials of the Ministry against continuing the work without a licence under regulation 56A but that he chose to disregard these warnings and persisted in carrying on the work. No evidence has been tendered on the part of the defendant to contradict or qualify these allegations and accordingly for the purposes of the present application I have to accept the averments in these affidavits as well founded and true.

From a consideration of the penalties which may be imposed for breaches of regulation 56A it is obvious that conduct in defiance of that regulation is to be regarded as a grave and serious offence. The penalties which may be imposed are now prescribed by S. R. & O., 1946, No. 371. Not only may substantial fines be imposed but a person guilty of an offence against the regulations may on summary conviction be sentenced to imprisonment for a term not exceeding one year or on conviction on indictment may be sent to penal servitude for a term not exceeding seven years.

Ch.D. 1948.

ATTORNEY-GENERAL FOR NORTHERN IRELAND v. EASTWOOD.

BLACK J.

The present proceedings are not, of course, proceedings to enforce these penalties. They are quite separate and apart from such criminal proceedings as the responsible authorities may see fit to institute against the defendant. This court is not directly concerned with any such proceedings. If such proceedings are brought it will be for the tribunal before which they are brought to decide whether the defendant has been guilty of an offence against the regulation, and if it is decided that he has been guilty of such an offence it will be for the judge or magistrate presiding in that court to fix the term of imprisonment or the fine which the circumstances of the case appear to require.

It is well established, however, that in a case of this type where a breach of a statute or regulation prohibiting certain matters in the general public interest is threatened or is being committed the Attorney-General can—quite apart from any question of the infliction of the penalties prescribed by the Act or regulation—invoke the assistance of the court to restrain by injunction the commission or continuance of the mischief against which the statute or regulation is directed. I need only refer to such cases as *Attorney-General v. Ashborne Recreation Ground Company* (1), *Attorney-General v. Sharp* (2), *Attorney-General v. Premier Line, Ltd.* (3). I think a case where what is threatened or is being committed is a breach of regulation 56A is essentially the kind of case in which the court ought to lend its assistance by its remedy of injunction. The object of regulation 56A is to ensure in a time of shortage that labour and materials should be conserved for purposes which the authorities consider should be given precedence in the interests of the community, and should not be squandered in work which might well be deferred. The regulation expressly declares that it shall be unlawful to carry out unauthorised work. The heavy penalties which may be imposed indicate that a breach of the regulation is to be regarded as a serious evil. The public are gravely

(1) [1903] 1 Ch. 101.
(2) [1931] 1 Ch. 121.
(3) [1932] 1 Ch. 303.

concerned to see that the wastage of labour and materials against which the regulation is aimed should not take place. To my mind the case clearly falls within the category in which the courts have consented to intervene by injunction at the suit of the Attorney-General to prevent the commission or continuance of illegal conduct which is an injury to the community, even although proceedings in a criminal court may also be taken to secure the punishment of the person or persons who have committed the offence. Accordingly I am of opinion that on the evidence before me the Attorney-General is clearly entitled to an injunction restraining the defendant from carrying out any further work at the premises in breach of the regulation.

I am also asked on behalf of the Attorney-General to grant a further injunction of a manadatory nature directing the defendant to demolish such work as he has carried out in breach of the regulation.

To grant an injunction of this nature however would I think be for this court to go farther than it is justified in going, and certainly would in my view be to go farther than is warranted by any of the authorities to which I was referred by counsel for the plaintiff.

In granting an injunction to restrain the defendant from carrying out any further work in breach of regulation 56A the court is lending its assistance to prevent the commission of certain acts which that regulation declares unlawful. A mandatory injunction however is not an injunction directed to prevent the commission of illegal acts. It is an injunction to prevent the continuance of an illegal state of affairs. If a man threatens to build a wall encroaching on my garden I can obtain an injunction to prevent him committing this illegal act. If he has already proceeded with the building of the wall in spite of my protests I can obtain a mandatory injunction to prevent the continuance of this illegal state of affairs by compelling him to take down and remove the wall. When one looks at regulation 56A one finds that it is a regulation merely making illegal the commission of certain acts. It does not make illegal the continuance

Ch.D. 1948.

ATTORNEY-GENERAL FOR NORTHERN IRELAND v. EASTWOOD.

BLACK J.

of the state of affairs resulting from those acts. Once work has been done in breach of that regulation the regulation does not make it illegal for the owner of the premises to continue in enjoyment of the premises upon which the work has been done. There is nothing in the regulation to compel him to undo the work. There is nothing in the regulation to make it a continuing offence to retain or to continue in enjoyment of the work which has been unlawfully done. Nothing is imposed in the nature of a daily penalty.

Accordingly the court by granting a mandatory injunction would not be assisting in restraining or preventing anything which is made an offence by the regulation. It would be endeavouring to put an end to a state of affairs the continuance of which, curiously enough, is not made illegal by the regulation. If any court was to be given jurisdiction to order work to be undone which had been done in breach of regulation 56A, this jurisdiction in my view ought to have been conferred by the regulation. It is of course a familiar provision that power may be given to a public authority to pull down or remove work which has been illegally executed (Public Health Act, 1875, s. 158; Public Health (Ireland) Act, 1878, s. 42). But no such power is given by regulation 56A. By granting the mandatory injunction which the plaintiff seeks this court would not be merely lending its assistance to prevent the commission of acts which regulation 56A has declared to be unlawful. It would be seeking to prevent the continuance of a state of affairs the continuance of which regulation 56A, presumably for some good reason, has very pointedly omitted to declare to be unlawful. In other words it would be arrogating to itself a jurisdiction which regulation 56A has not conferred on any court, a jurisdiction to treat the results of the work which had been unlawfully done as a continuing illegality.

In support of the claim for a mandatory injunction the case of *Attorney-General v. Wimbledon House Estate Company, Ltd.* (1) was much relied on by the plaintiff. In that case Farwell J. granted a mandatory

(1) [1904] 2 Ch. 34.

injunction directing the removal of part of a building which had been erected so as to project beyond the line of the front main wall of the adjoining house in breach of s. 3 of the Public Health (Buildings in Streets) Act, 1888. I do not think that that decision really assists the plaintiff. The evil at which the statutory provision was directed in that case was obviously not the mere act of erecting the building but the continuance of the state of affairs in which it would permanently project beyond the frontage line of the adjoining house. Indeed this is made clear by the section itself which provided that any person offending against it should be liable to a penalty not exceeding forty shillings for every day during which the offence was continued after written notice in that behalf from the urban authority. Accordingly the illegality with which Farwell J. had to deal was the unlawful continuance of a state of affairs made expressly a continuing illegality involving a continuing daily penalty. It is entirely in accord with the other authorities that he should have lent the assistance of the court to curb this illegality by granting a mandatory injunction to bring to an end the continuance of the unlawful state of affairs.

In the present case, however, as I have already pointed out, there does not appear to be anything in regulation 56A to render the continuance of the state of affairs unlawful after the forbidden work has for good or for evil been done.

I therefore do not see my way to grant the mandatory injunction which the plaintiff claims.

As the defendant consents that the hearing of the motion be treated as the trial of the action this will be recited in the order and the order will direct that the defendant his servants and agents be perpetually restrained from carrying out or continuing to carry out any work in the construction reconstruction alteration decoration or repair of the building at Molesworth Street, Cookstown, County Tyrone (mentioned in the endorsement of the writ of summons) in breach of the provisions of regulation 56A (2) of the Defence (General) Regulations, 1939. The defendant will also

Ch.D. 1948.

ATTORNEY-GENERAL FOR NORTHERN IRELAND v. EASTWOOD.

BLACK J.

be ordered to pay the plaintiff's costs of the action when taxed, including his costs of the application and order of the 1st June, 1948.

Order accordingly.

Solicitor for the plaintiff : *Chief Crown Solicitor.*
Solicitor for the defendant : *E. Malachy Doris.*

M. V. P.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS (1).

C.A. 1948.

Nov. 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22.

1949.

Feb. 22.

Settlement—Condition subsequent—Forfeiture clause—"Become a "Roman Catholic or profess that he or she is of the Roman "Catholic religion"—Uncertainty—Infant—Parental duty—Public policy.

Family arrangement—Re-settlement—Non-disclosure of forfeiture clause—Rectification—Delay—Acquiescence.

A condition subsequent in a re-settlement provided that if any person thereby made tenant for life or tenant in tail by purchase should "become a Roman Catholic or profess that he or she is of the "Roman Catholic religion" then both such person and his issue should forfeit all interest thereunder. It was contended (i) that the condition was void for uncertainty in that the term "Roman "Catholic" was ambiguous; that it was not possible to ascertain with certainty how or at what time a person "became" a Roman Catholic; and that it was not certain what acts or conduct would amount to "profess," or whether "religion" meant religious organisation or a system of belief; (ii) that the condition was void as contrary to public policy as tending to fetter the father of any infant entitled under the settlement in discharging his parental duty with regard to the religious instruction of such child.

Held, by the Court of Appeal (Andrews L.C.J. and Babington L.J.) affirming the decision of Black J. on this point, that the term "Roman Catholic" was to be interpreted as reasonably understood by ordinary persons and its meaning in this sense was not uncertain; and that whether a person had become a Roman Catholic and whether a person had professed that he or she was of the Roman Catholic religion were questions of fact capable of being understood with certainty and of being ascertained with precision.

Held, further, by Andrews L.C.J. that where the choice of religion may involve a forfeiture the court will not hold a beneficiary to a binding choice until he is of age when he can exercise a free and real choice of his own, and accordingly the condition did not interfere with the father's exercise of his right to determine in what religion his children shall be educated.

A father and son who were entitled under two settlements as tenant for life in possession and tenant in tail in remainder respectively concurred in a re-settlement on the coming of age of the son, the father bringing into the re-settlement certain lands of which he was seised in fee simple. By the re-settlement the properties com-

(1) In the Court of Appeal before Andrews L.C.J. and Babington L.J.

BIBL. LONDIN. UNIV.

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

prised therein were limited to the father for life, then to the son for life, with divers remainders over including remainders to the son's children in tail.

At the instance of the father a forfeiture clause was inserted in the re-settlement by which if any person entitled under the re-settlement as tenant for life or tenant in tail by purchase should become a Roman Catholic or profess that he or she was of the Roman Catholic religion the property should pass under the settlement as if such person were dead without issue. The son was not consulted about this clause and did not know of its insertion, and he executed the re-settlement in ignorance that the clause was contained therein and without professional advice.

Held, by the Court of Appeal (Andrews L.C.J. and Babington L.J.), affirming the decision of Black J. on this point, that the father stood in a fiduciary relation to the son, and as the forfeiture clause was of such unusual and drastic character it was the father's duty to ensure that an exact and complete disclosure and a proper explanation were given to the son, and as this had not been done the son had acquired a right to have the re-settlement rectified by the deletion of the clause.

Quaere per Babington L.J. whether the father was not under a misapprehension as to the full effect of the clause and that on this ground also the re-settlement might have been rectified.

Held, however, by Andrews L.C.J. that as after the events giving rise to a forfeiture had occurred the son had by a series of unequivocal acts shown a determination to abandon any claim to the property comprised in the re-settlement he was barred by acquiescence from asserting his right to rectification.

Contra per Babington L.J. on the ground that the true inference to be drawn from the evidence was that the son had not irrevocably accepted the forfeiture clause nor abandoned his right to impeach it.

Held, further, by Andrews L.C.J., Babington L.J. reserving his opinion on this point, that the son's children who had interests in remainder under the re-settlement had independent rights of action similar to that of the son to have the re-settlement rectified by the deletion of the forfeiture clause, and that such children were not affected by any acquiescence on the part of their father.

Decision of Black J. [1948] N.I. 72 affirmed in the result.

APPEAL from an order of Black J.

In this action the plaintiffs Connolly Robert McCausland, his wife Margaret Louisa McCausland, and his eldest son Marcus Edgcumbe McCausland (an infant suing by the said Connolly Robert McCausland as next friend) had claimed that a clause of forfeiture in an indenture of re-settlement was void, or alternatively that the said indenture of re-settlement

should be set aside or rectified. The defendants in the action were the trustees of the re-settlement and the other parties interested thereunder. The facts of the case are summarised in the judgments and will be found set out in full in the report of the case in the court below(1).

The action was tried before Black J. and at the conclusion thereof the learned judge made an order dated the 8th March, 1948, in which it was declared that the plaintiff Connolly Robert McCausland was precluded from contending that the provisions of the forfeiture clause did not apply to or affect his life interest in the properties comprised in the re-settlement and that in so far as the said provisions purported to affect his life estate in the said properties they were to be regarded as valid and effective ; and further, that the properties comprised in the re-settlement were to be treated during the remainder of the life of Connolly Robert McCausland as being held to the uses and upon the trusts and subject to the powers and provisions to and upon and subject to which the same would have stood limited and settled by virtue of the re-settlement if the said Connolly Robert McCausland were dead without issue. A further declaration provided that the forfeiture clause was not binding on the plaintiff Marcus Edgcumbe McCausland or on any person entitled in remainder to him under the limitations contained in the re-settlement. The order also provided that the re-settlement should be rectified in accordance with these declarations.

Charles Norman Stronge, the only surviving trustee of the indenture of re-settlement, appealed from this order to the Court of Appeal on the ground that the declarations were against evidence and the weight of the evidence, and were wrong in law. The plaintiff Connolly Robert McCausland by cross-notice of appeal sought a variation of the order of Black J. in so far as the declarations in the order asserted that the forfeiture clause was valid and applied to or affected his life interest in the properties comprised in the re-settlement.

(1) Reported at [1948] N.I. 72.

C.A. 1949.

McCausland and Others v. Young and Others.

All the other parties to the action expressed through their respective counsel at the opening of the appeal their willingness to abide by the order of Black J. and took no further part in the appeal.

Curran A.-G., McCoy K.C. and *McVeigh* for the appellant, the trustee of the re-settlement.

McSparran K.C., Nicholson K.C. and *Grant* for the respondents Connolly Robert McCausland, Margaret Louisa McCausland and Marcus Edgcumbe McCausland (suing by Connolly Robert McCausland his next friend).

Gibson for the respondent Marcus Perronet Thompson-McCausland.

McCall for other parties interested under the re-settlement.

Cur. adv. vult.

Andrews L.C.J.

Andrews L.C.J. : The facts of this case and the circumstances under which proceedings were instituted have been so fully dealt with in the exhaustive judgment of Black J., from whose order the appeal has been brought to this court, that I propose to dispense with any general recital of facts, and shall confine my introductory words to a brief reference to the terms of that order and of the notice of appeal and cross-notice which are before us.

That order, dated the 8th March, 1948, declared that in the events which have happened the plaintiff, Connolly Robert McCausland (to whom, for the sake of brevity, I shall hereinafter refer as "Connolly "McCausland") is precluded from contending that the provisions of clause 15 contained in the indenture of re-settlement of the 4th August, 1927, do not apply to or affect his life estate in the properties comprised in that settlement, and that in so far as the said provisions purport to affect his life estate in the said properties, they are to be regarded as valid and effective. By the said order it is further declared that as from the 3rd May, 1940, the hereditaments and

premises and capital monies comprised in the said re-settlement are to be treated during the remainder of the life of Connolly McCausland as being held to the uses and upon the trusts and subject to the powers and provisions to and upon and subject to which the same would have stood limited and settled by virtue of the said re-settlement if Connolly McCausland were dead without issue. A further declaration provided that the said clause 15 is not binding on the plaintiff Marcus Edgcumbe McCausland (the eldest son of Connolly McCausland) or any person entitled in remainder to him under the limitations contained in the said re-settlement. The order also provided that the re-settlement be rectified in accordance with the foregoing declarations; and further declared that the provisions of clause 15 do not apply to the jointure rent-charge appointed to the plaintiff Margaret Louisa McCausland (in the event of her surviving her husband Connolly McCausland) by the marriage settlement of the 6th June, 1932.

The first notice of appeal from this order, bearing date the 8th June, 1948, was served on behalf of the defendant, Charles Norman Stronge (surviving trustee of the said indenture of re-settlement) for an order that the judgment and declarations be varied in so far as they fail to adjudge and declare that Connolly McCausland was and is in all events bound by clause 15, and that the foregoing declaration as to how the hereditaments, premises and moneys should be treated during the remainder of the life of Connolly McCausland be varied by expunging therefrom the words limiting such declaration to such period; that the declaration that clause 15 is not binding on the plaintiff Marcus Edgcumbe McCausland or any person entitled in remainder to him be reversed, and that in lieu thereof it be declared that the said plaintiff and any such persons so entitled in remainder are bound by the said clause 15; that the order that the said re-settlement be rectified be set aside; that the declaration in reference to the jointure rent-charge be reversed and set aside; that it be declared that clause 15 is valid, effective and binding upon the plaintiffs and each of

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

them; and that the learned judge's direction as to costs be varied as in said notice mentioned. The grounds of appeal expressed briefly were that the declarations were against evidence and the weight of evidence, and were wrong in law.

A fortnight later than the said notice of appeal, a cross-notice of appeal, dated the 23rd June, 1948, was served, in which Connolly McCausland sought a variation of the learned judge's order:—

(1) by striking out the declarations—

(*a*) as to Connolly McCausland being precluded from contending that the provisions of clause 15 did not apply to or affect his life estate; and

(*b*) that in so far as the said provisions purport to affect his life estate they are to be regarded as valid; and

(*c*) as to how the hereditaments, premises and moneys were to be treated during the remainder of Connolly McCausland's life; and

(2) by deleting the order that the re-settlement be rectified in accordance with such declarations.

The said notice of appeal further asked that it might be declared that notwithstanding clause 15 Connolly McCausland is now and has always been entitled to the estate for his life limited to him, and that said clause 15 is not binding on him; and for an order that the said re-settlement be rectified accordingly. The said notice of appeal also contained an intimation on behalf of Connolly McCausland and his said son Marcus that they would contend that clause 15 is—(*a*) void for uncertainty; (*b*) void as contrary to public policy; and (*c*) not binding on them or either of them or on any person entitled in remainder. There followed in this notice of appeal an alternative prayer in the following terms: "That, otherwise as aforesaid, the "respondents will contend that the order appealed "from is correct and should stand affirmed, including "the rectification ordered in accordance with the "declaration that the said clause 15 is not binding on "the respondent Marcus Edgcumbe McCausland or

"any person entitled in remainder to him under the "limitations contained in the said re-settlement." Though nothing was heard of this alternative prayer in the notice of appeal during the course of the arguments which occupied eleven days in our court, its presence in the notice was not without significance. In this connection I would add that all the other parties served with the notices of appeal, with the exception of the trustee, expressed through their counsel, at the opening of the appeal, their willingness to abide by the order of Black J., and took no part in the hearing in this court.

The first submission which was pressed upon us by Connolly McCausland's counsel was that the so-called religion or forfeiture clause (No.15) of the re-settlement of the 4th August, 1927, is void for uncertainty; and, secondly, it was contended that it is void as being contrary to public policy. Whilst these are separate and distinct issues, yet are they somewhat analogous; and for that reason it appears to me that they may be conveniently grouped, and to a certain limited extent considered together.

The material words of the forfeiture clause are as follows:—"If any person hereby made tenant for life "or tenant in tail by purchase of the settled freeholds "shall become a Roman Catholic or profess that he "or she is of the Roman Catholic religion then and so "often as the same shall happen the settled freeholds "shall go and remain to the uses upon the trusts and "subject to the powers and provisions to upon and "subject to which the same would have stood limited "and settled by virtue of these presents if such person "were dead without issue."

It was upon the words "shall become a Roman "Catholic or profess that he or she is of the Roman "Catholic religion" that the attack on this branch of the case was directed. It was argued that the meaning of these words is so uncertain that it cannot be ascertained with the requisite degree of definiteness. Some standard, it was said, must be available and applied in order to determine if any person has become a Roman Catholic. To be legally binding, it was

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS

ANDREWS L.C.J.

argued, the clause which defeats on a contingency a vested estate must be such that the court may be able to appreciate from the beginning its meaning and significance : see the speech of Lord Cranworth in *Clavering v. Ellison* (1). Reliance was also placed on the words to the like effect of Parker J. in *In re Sandbrook* (2), that conditions subsequent, in order to defeat vested estates, or cause a forfeiture, must be such that from the moment of their creation the court can say with reasonable certainty in what events the forfeiture will occur. In other words, the court must be able to say with certainty when and in what circumstances the clause will become operative and the forfeiture will be worked. The test, it was submitted, is not what Connolly McCausland or his father thought was the meaning of " Roman Catholic." Is it to be the meaning which would be assigned to it by a member of the general public or by a canonist ? The settlor has failed to provide the test. Again, it was asked, may a beneficiary under the trust " become a " Roman Catholic " by gradual process, or can he only become such by a ceremony of reception into the Church ? Further, what is meant by the word " profess "—a word which, it was contended, is most ambiguous. No limits of " profession " it was argued are prescribed by the settlor. What must its degree be ? Must it be by words, or may it be by conduct ? And, if by words, to whom must the profession or affirmation of adherence to the Roman Catholic religion be made ?

Such are the doubts and difficulties which, it was contended in argument, render clause 15 of the deed uncertain and unenforceable ; and in support of these contentions the plaintiffs produced as witnesses two eminent Doctors of Divinity and authorities on the canon law, Dr. William Conway, of Maynooth, and Dr. Arthur Ryan, of The Queen's University of Belfast, the submission being that the issues of fact raised in the forfeiture clause could only be determined by the law and practice of the Roman Catholic Church. They were, indeed, able exponents of the case which

(1) (1859) 7 H.L.C. 707, 725. (2) [1912] 2 Ch. 471, 477.

they were presenting; but, having given it my most careful consideration, I am forced to the conclusion that their evidence is not of any real assistance to the plaintiffs' case. In expressing this opinion I am not unmindful of the admission made by Dr. Ryan to the learned Attorney-General in cross-examination that "when you find in a document a phrase 'Roman "'Catholic' or 'Roman Catholic religion' it is not "a phrase taken from the canon law of the Church; "and in searching for a meaning you will not get any "assistance from the canon law." If this be so, one naturally asks why have recourse to them or seek their aid? Why not interpret the words as, what Black J. calls, "an ordinary English phrase"? Why should they not bear the meaning in which they would naturally be used by the settlor—the meaning assigned to them in ordinary every-day speech? It is evidence such as that given by Dr. Conway and Dr. Ryan which, if accepted, would be calculated, as was doubtless intended, to create doubts where in my opinion there were really none. It is the words of the settlor, not of the canonist, which we are called upon to construe; and in my opinion it would be entirely wrong of us if we were to interpret the words of the settlor by reference to criteria of the canon law with which he was in all probability quite unfamiliar. In this connection I may say that I am impressed by the words of Gavan Duffy P. in *In re McKenna* (1), that a Protestant farmer testator knew what he meant, and practically every citizen in every walk of life, be he Catholic or Protestant, knew the meaning conveyed, by the words "marry a Roman Catholic"; and the learned President added that he had only to construe the plain words used by a plain man in a sense plain to all of us. This, in my view, is common sense, which I am not prepared to hold in the present case to be in conflict with any settled principles of law.

The clause, when examined, is found to contain two alternatives, in either of which event the forfeiture operates. I entirely agree with Black J. when he says that the first of these "shall become a Roman

(1) [1947] I.R. 277.

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

"Catholic" must be taken as referring to a person who had previously not been a Roman Catholic, but had come to embrace that religion; and that the second "profess that he or she is of the Roman Catholic "religion" was intended to cover a case where a person had always been a Roman Catholic, or where there was a doubt whether the person so professing had been formally accepted into the Roman Catholic Church. Greater width of meaning must be given to the words of this composite clause, with its two limbs thus disjunctively expressed, than would be possible had they been, as in *Clayton v. Ramsden* (1), expressed in conjunctive form. The clause was in my opinion designedly drafted in this wide form so as to embrace within its scope everyone of the character mentioned in it, who, whether by formal or ceremonial admission to the Roman Catholic Church or otherwise, accepted the authority of the Roman Catholic Church.

Black J. has referred to several cases in which it does not appear to have been even suggested that conditions working a forfeiture in the event of a legatee becoming a Roman Catholic were void. I need not repeat them here. Suffice it to say that it is only recently, as it appears to me, that such an argument could be advanced with any hope of success. One might also refer to statutory enactments such as the Act of Settlement, 1701 (12 & 13 W. 3, c. 2), in which similar, if not in all cases, identical, language has been employed by Parliament, and is thus part of the accepted public law of our country. How, I ask, can it be said that such words have no defined meaning?

In these circumstances the plaintiffs mainly based their case on this issue in its legal aspect upon two recent authoritative decisions. The first is *Sifton v. Sifton* (2), in which the provision that payments were to be made only so long as the testator's daughter should continue to reside in Canada was held to be a condition subsequent which was void for uncertainty upon Lord Cranworth's principle in *Clavering v. Ellison* (3), the words "to reside in Canada" being

(1) [1943] A.C. 320.
(2) [1938] A.C. 656.
(3) (1859) 7 H.L.C. 707.

regarded as uncertain and ambiguous in meaning owing to the elasticity of the word "residence," and the fact that the testator had clearly intended that his daughter should be at liberty to leave Canada for some purposes and periods undefined. To attempt to define precisely or distinctly the events that would constitute a ceasing "to reside in Canada" would necessarily end in failure. This case, so different in its facts from the present, is, as it appears to me, only of importance in the present case because of its approval and application of Lord Cranworth's principle. with the addition that the events referred to in the condition should be apparent not only to the court but also to the parties concerned : (see the opinion of Lord Romer) (1).

The second case, so strongly relied upon by the plaintiffs, is *Clayton v. Ramsden* (2), which bears a closer resemblance on its facts to the present, yet in my opinion there are important and vital differences. In it a condition of forfeiture applied if the testator's daughter should at any time after his death marry a person "not of Jewish parentage and of the Jewish "faith." The House of Lords held that this was one composite clause, and accordingly, that there was only one condition of forfeiture and not two alternative conditions, so that the condition would be void as a whole if one limb of it were void. They further held that the first limb of the condition (as to Jewish parentage) was void for uncertainty, doubts clearly existing as to whether the words referred to race or religion or to both ; and, if they referred to race, as the House thought more probable, as to what proportion of Jewish blood in the husband would satisfy the requirement that he should be of Jewish parentage. The House further considered that the second limb (as to Jewish faith) was also void for want of sufficient indication by the testator as to the requisite degree of attachment or adherence to the faith which he required on the part of his daughter's husband.

I do not regard these cases as authorities which govern the present case. The clause which we are considering is not composite in the sense of constituting

(1) [1938] A.C. at 675. (2) [1943] A.C. 320.

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

only one single condition of defeasance. Forfeiture arises if the party concerned either becomes a Roman Catholic *or* professes that he or she is of the Roman Catholic religion. I do not regard the first limb of this condition as in any way more uncertain than was the condition in *In re Evans* (1), in which the relevant words were " become a convert to the Roman Catholic " religion," where it was held that the baptism into the Roman Catholic Church of a person becoming a convert to the Roman Catholic religion was an act which the court could ascertain with certainty and which would, in a proper case, create a forfeiture. In this connection, I may say, it was not surprising to find that the plaintiff Connolly McCausland admitted in cross-examination that he thought both he and his father knew in 1927 what was meant by the words " Roman Catholic."

But, even if I am wrong in the view which I have expressed, I am quite unable to appreciate the existence of any element of doubt or uncertainty in whether a person " professes " that he or she is of the Roman Catholic religion. It is a question of fact—a purely subjective act or pronouncement—as to which, I may say again, it is admitted that no doubt exists in the mind of the plaintiff Connolly McCausland. I fully appreciate that the test as to the validity and binding character of the clause does not rest on the knowledge and appreciation of its meaning by the individual; but, when the individual is one so vitally interested as Connolly McCausland, I cannot think that such considerations are wholly irrelevant. However this may be, I am clearly of opinion that the forfeiture clause in the re-settlement of the 4th August, 1927, satisfies the most exacting requirements of Fry J. in *In re Viscount Exmouth* (2), as to clarity and certainty of expression in the creation of the limitation, and also in its operation; and that it is also consonant with judicial dicta in the later cases to which I have referred. The argument contra is that the term " profess " may have many degrees; and that it may not always be possible to state with accuracy and certainty what words or deeds would clearly amount to a " profession." In my clear

(1) [1940] Ch. 629 (2) (1883) 23 Ch.D. 158, 164.

opinion, any one who openly accepts the authority of the Roman Catholic Church in religious matters may reasonably and properly be said to "profess that he is "of the Roman Catholic religion." The possibility of a difficulty of proof arising in an individual case will not render a condition void if it is clear, distinct and certain in itself. This second limb of the clause is of greater width and scope than the first, and so embraces a larger class, to which, in my opinion, the tests, conditions and requirements imposed by the canon law have no application.

I pass now to the contention that clause 15 is void as being against public policy. I hope I am doing the plaintiffs' counsel no injustice when I say that I did not understand this submission to be strongly pressed in our court. Thus, whilst *In re Borwick* (1) was cited, *In re Tegg* (2), which was apparently relied upon before Black J., was not opened. I am in full agreement with Black J. in all that he says on this issue. The principle underlying these decisions was that the condition which was held to be void operated to interfere with the free exercise of the parent's duty in regard to the religious instruction or upbringing of his children, or that it was a fetter upon the beneficiary's free discretion as to what was best for the welfare and education of the beneficiary's children. This principle was referred to by Parker J. in *In re Sandbrook* (3), in which he cited a passage from Sheppard's "Touchstone" at p. 132, that a condition is bad which operates to restrain or forbid a man from doing his duty. In *Borwick's case* (1) the condition against any of the settlor's grandchildren becoming a Roman Catholic was intended to operate during minority, i.e., before the attainment of a vested interest at twenty-one. In *In re Tegg* (2) the condition was to operate during the infancy of the children of the testator's daughter. The present case is entirely different in this respect; for, as Black J. points out, the condition is only to operate if the individual does a certain positive act, namely, becomes a Roman Catholic or professes the

(1) [1933] Ch. 657.
(2) [1936] 2 All. E.R. 878.
(3) [1912] 2 Ch. 471, 476, 477.

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

Roman Catholic religion; and such cases as *In re May* (1), *In re May* (2), and *Patton v. Toronto General Trusts Corporation* (3) clearly establish that in such circumstances the court, unless compelled by the express terms of the clause, will not hold the doing of the act by the beneficiary to work a forfeiture until he has reached an age, namely twenty-one years, when he can exercise a free and a real choice of his own. It is not unimportant to note that in the second of the two reported cases of *In re May* (2) above cited, the contention that the condition was contrary to public policy was abandoned in the Court of Appeal; and, further, that in neither of the cases was the argument advanced that the words "shall not be a Roman "Catholic" or "shall cease to be a Roman Catholic" or "shall become a Roman Catholic" were so uncertain or indefinite in meaning as in themselves to render the condition void. For the reasons above stated I hold that clause 15 in the re-settlement of the 4th August, 1927, cannot be declared void on the ground that it is contrary to public policy.

My next enquiry in this difficult case passes to a consideration of the submission made on behalf of the plaintiffs, which is collected from several paragraphs of the statement of claim, that clause 15 was inserted in the re-settlement without the knowledge or approval of Connolly McCausland, and without his having independent advice; and that the deed was executed by him under a misrepresentation as to its contents. This submission of fact is followed by the further submission of law that in such circumstances the deed of re-settlement must be rectified by the striking out or omission of the clause from the deed.

I shall first consider the question of fact, though not in every relevant detail, for that would be impracticable if this judgment is to be confined to reasonable limits. But certain facts of paramount importance appear to me to stand out as either admitted or as clearly established in evidence. To these I must refer.

(1) [1917] 2 Ch. 126.
(2) [1932] 1 Ch. 99.
(3) [1930] A.C. 629.

The plaintiff, Connolly McCausland, came of age on the 11th July, 1927. Educated at Eton, he went to Sandhurst in the autumn of 1925, and from there obtained a commission in the Irish Guards on the 29th January, 1927. Joining his regiment a fortnight later, he was not at home until some months after his twenty-first birthday. He states in his evidence that his father had not discussed the family property with him, and that he did not know how it was held; that his father was a Low-Churchman, but a strong and convinced supporter of the Church of Ireland; and that he, Connolly, was gradually becoming a "Higher "and Higher Churchman," and his father knew it. He sums up the position in the words "we were never "in agreement on these matters."

The proposal for a re-settlement of the family property (which was at the time held under a deed of re-settlement of the 9th August, 1897, by which Connolly McCausland's father, Maurice Marcus McCausland, was tenant for life and Connolly McCausland was tenant in tail male in remainder) was first made in a letter written by the father to the son about the month of March or April, 1927. Unfortunately, the letter is not forthcoming, and we know nothing of its contents save as stated by Connolly McCausland in his evidence—that it would be necessary to re-settle the property when he, Connolly McCausland, came of age; and that he, the father, would go over to England and talk about it, which he, in fact, did in July, 1927. Connolly McCausland fixes the date of the visit by saying that his father was in London on his twenty-first birthday, i.e., the 11th July, 1927; and this is fully confirmed by Mr. Ingram's letter to Mr. Longfield of the 5th July, from which it appears that he left on the 4th July and would not return till after the 12th. Connolly McCausland's account of the interview (and unfortunately owing to his father's death on the 14th January, 1938, we have no other account of it) is that his father told him of the necessity for a deed of re-settlement and for a disentailing deed, and that Mr. Ingram, the family solicitor, and a cousin by marriage of the father, would send the necessary deeds and

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

instructions. Connolly McCausland further states that his father said that he had settled with his father in the same way; and, accordingly, he, Connolly McCausland, gathered it was a thing which was done between most fathers and sons when a son came of age. He declares that he did not know what his rights were under the previous settlement, and that his father did not convey to him what the effect would be. He adds that his father emphasised the importance of signing the deed when it was sent across without delay, because, as he puts it, "of some stamp duty which "would expire fairly soon."

Such is Connolly McCausland's recollection of this all-important interview as detailed in his evidence. Its accuracy and sufficiency are, of course, challenged by the learned Attorney-General on behalf of Sir Norman Stronge, the sole surviving trustee of the re-settlement of the 4th August, 1927. The Attorney-General rests his contention on this point in a large measure upon the fact that when Mr. Ingram stated in his letter of the 3rd October, 1940, to Connolly McCausland that he had at the time "concurred" with his father's intentions and wishes, Connolly McCausland left this letter unanswered. To me it is a complete answer to this omission that on receipt of the letter he immediately got leave and went to Londonderry to see Mr. Ingram, with whom he had an interview on the 9th October, when he asserted, as appears in Mr. Ingram's office entry, that he had never heard of the religion clause in the re-settlement of 1927 till the terms of his own marriage settlement were being discussed in 1932, and that he did not realise then that a forfeiture would affect his family.

The Attorney-General's argument, however, necessitates a closer examination of the contemporaneous entries in Mr. Ingram's records as the only evidence, other than Connolly McCausland's, which is available; for unfortunately Mr. Ingram died in May, 1943. These records show that on the 15th June, 1927, Mr. Ingram had an attendance on the father, Maurice Marcus McCausland, and had discussed with him the terms of the proposed re-settlement, a copy of which

he sent to him later on the same day, together with a covering letter in which he called attention to the fact that certain matters, including "the proposed con- "dition as to religion," were not dealt with in the draft, as he proposed instructing counsel to draw the additional clauses which would be necessary to give effect to his, Maurice Marcus McCausland's intentions. There was a further attendance by Mr. Ingram on Maurice Marcus McCausland on the following day, going through the draft re-settlement and advising; and on the same day instructions were sent by Mr. Ingram to the well-known conveyancing counsel, Mr. Longfield—then in semi-retirement—to settle draft disentailing deeds and re-settlement. These instructions purported to have been sent on behalf of both the father, Maurice Marcus, and the plaintiff Connolly McCausland, though there is not a particle of evidence to show that at the time Connolly McCausland had ever been consulted about or informed as to the contents of the draft deeds. The instructions contained an intimation that it was desired that certain clauses should be drafted by counsel and inserted in the re-settlement. One of these (No. 3) was expressed in the following terms :—"It is suggested that a clause "might be inserted in the re-settlement providing that "if any person benefiting under the limitations in the "re-settlement shall become a Roman Catholic such "benefit shall cease and the property go over to the "next in remainder. Counsel will please draft such "a clause for the consideration of querists."

It was the 21st July before Mr. Ingram received back the draft deed from Mr. Longfield, with a covering letter of the 19th July, in a postscript to which he said that "a clause shifting the investments if one of the "takers changes his or her religion, etc., is very difficult "to draw, but I will attempt it of course while you are "having the drafts copied." This was followed by a further letter from Mr. Longfield of the 26th July, in the course of which he wrote : "I have settled as you "requested a draft of a shifting clause, designed to "prevent a person who is or becomes a Roman Catholic "from enjoying the settled property. These provisions

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

"are unusual, and I am rather against their insertion "as they often lead to costly litigation." The next day, on receipt of the draft, Mr. Ingram wrote to Mr. Maurice Marcus McCausland asking for a call on the following day, and requesting him, if unable to do so, to let him know whether he approved of the clause of which he sent a copy, and if he wished to have it inserted in the deed. It does not appear that Mr. Ingram ever conveyed to Mr. McCausland counsel's opinion against the insertion of the clause in the deed, or his prophetic words as to these clauses often leading to costly litigation.

On the same day Mr. McCausland replied directing the insertion of clause 15 (1). He was obviously troubled with the meaning of clauses 15 (2) and 15 (3), but said he concluded that all these three clauses, having been drawn up by Mr. Longfield, were "necessary and correct." I agree with Mr. Nicholson when he contended on behalf of the plaintiffs, that this must mean necessary and correct to carry out the instructions which he, Mr. McCausland, had given; for this view is confirmed by the further paragraph in Mr. McCausland's letter: "If you approve of them "(i.e., the clauses) I am satisfied, as what I desire is "that a R. C. cannot succeed to the lands or to the "Trust money." Here I would observe that, if Mr. McCausland ever intended that the Protestant issue of a Roman Catholic father or grandfather should be deprived of his right of succession to the property under the re-settlement, he certainly never so expressed himself. In my opinion his instructions on the matter to counsel clearly indicated otherwise.

And so these three clauses 15 (1), 15 (2) and 15 (3) were inserted in the deed apparently without Mr. McCausland ever being informed of counsel's opinion in regard to them, and, further, and of still greater importance, without it being appreciated apparently by any one that by the inclusion of the last two words in sub-clause (1)—"without issue"—a tenant for life or in tail who brought himself within its provisions by becoming a Roman Catholic, or by professing that he or she was of that religion, not merely defeated his

own interest, but also that of his issue, though such issue might themselves be Protestants. It was a much wider and more far-reaching clause than counsel had been instructed to draft, or, indeed, than counsel had himself indicated its effect to be in his letter of the 26th July; yet this, I repeat, was apparently not appreciated by either Mr. McCausland or Mr. Ingram at the time. The correspondence and office entries to which I have referred are, in my opinion, conclusive as to this.

If such be the position of the matter so far as Mr. Maurice Marcus McCausland is concerned, how much stronger is the position of the plaintiff, Connolly McCausland? Wholly apart from this last point to which I have referred, namely, the defeasance of the interests of the issue of a Roman Catholic—Connolly McCausland's evidence is to the effect that he neither heard nor knew anything about this religious clause in 1927, and that he would not have signed the deed if he had known what he knew after Mr. Ingram had explained it to him in August, 1940. The Attorney-General has asked us not to accept Connolly McCausland's evidence as to his ignorance of the clause, submitting that, as Black J. rejected his evidence in so far as it was in conflict with that of his brother-in-law Lucius Thompson, it should not be accepted on the important issue which I am now considering. I am unable to accept the Attorney-General's submission, as all the probabilities of the case appear to me to support Connolly McCausland's evidence as to his ignorance of the existence of the clause. It was not, as I have already mentioned, until the 27th July that the draft of the clause reached Mr. Ingram, and that it was decided by Mr. McCausland that it should be inserted in the deed. Prior to that the instructions to counsel, the correspondence with counsel, and the office entries had merely contained such expressions as "it is *suggested* that a clause might be inserted in "the re-settlement" etc., or "the *proposed* condition "as to religion." Nothing definite was decided upon until the 27th July. How then could Connolly McCausland have been informed when his father

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

ANDREWS L.C.J.

visited him in London two or three weeks earlier that the re-settlement would contain such a clause? Yet this was the only personal contact which he, Connolly McCausland, had at this time with his father about the deed. Admittedly, he never saw Mr. Ingram; and in my opinion the strongest evidence in Connolly McCausland's favour on this point is the latter's letter to him of the 4th August, addressed to him at the camp at Woking, Surrey, where he was stationed with his regiment. This letter was written at a later hour on the day upon which his father had already signed the re-settlement and the other necessary documents. This letter is referred to in Mr. Ingram's office entry as "a very long letter to Mr. C. R. McCausland informing "him and explaining effect of re-settlement." It well merits the reference in the entry to its length, but I cannot say the same of the rest of the entry. It commences with words which were definitely misleading (I have no doubt unintentionally so), in which Mr. Ingram states that the re-settlement had been prepared following the general lines of the re-settlement which was executed in 1897 after his father attained age. The rest of the letter contains reference to the £400 annuity which Connolly McCausland was to receive during his father's lifetime, and to the life estate which he would receive after his father's death with remainders over. So also is mentioned the power to charge a jointure for his wife and sums for his younger children. The lands comprised in the re-settlement are referred to specifically, including those mentioned as having been purchased by his father out of his private means; and, as against this, reference is also made to the withdrawal of substantial settlement moneys. The names of the trustees are stated; the disentailing deeds and memorials are mentioned; the name of London solicitors is given at whose office the deeds could be signed; and an urgent request is made that there should be no delay as the time for stamping the documents was limited. All this is detailed and explicit. On the other hand, from beginning to end of this long letter there is not a single word about the religion clause, though such a clause was a clear

departure, in a way that Connolly McCausland's father considered most material, from "the general lines" of the re-settlement of 1897. Further, there is no reference to Mr. Longfield's opinion against the insertion of such a clause. One wonders why this silence. Connolly McCausland's father was obviously concerned about the religious outlook of his son. For this very reason it was doubly important that both the existence and the legal effect of this clause should be mentioned and explained; but this was not done. With no more legal instruction in reference to the terms of the re-settlement deed than is contained in Mr. Ingram's letter, Connolly McCausland complied with the request that he should attend at the office of the London solicitors, who had still less information than Connolly McCausland had in regard to the contents of the re-settlement, the two disentailing deeds and the four memorials, which, according to Mr. Ingram's letter of the 29th July, were being sent to them in order that they might be "duly witnessed and verified." With such limited authority and instructions I am not surprised that, as Connolly McCausland stated in his evidence, no explanations were given to him by the solicitor, though he was asked if he wanted to read the several documents. He tells us that he endeavoured to do so, "trying to understand them" but he "couldn't make very much of it." After two pages or so he abandoned the task and signed the deed, not seeing, as he swears, the religion clause, and not knowing that such a clause was in the deed. Black J., who heard the witness give his evidence, says that he has no reason to disbelieve his account of what happened.

Whilst the instructions to counsel purported to have been sent on behalf of both Mr. Maurice Marcus McCausland and Connolly McCausland it is obvious, as Black J. has held, that they were given to Mr. Ingram by the father alone. Connolly McCausland, as I have stated, was never informed as to counsel's opinion, nor of course of the fact that the clause was so much more drastic than that which counsel had been instructed to draft. Connolly McCausland was

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

never sent a draft of the deed, or, in particular, of the religion clause for his consideration or approval. He was not even afforded an opportunity—much less was he advised—to obtain the services of an independent solicitor. The London solicitors were named by Mr. Ingram, apparently because a partner in the firm—a Mr. Borrer—was a personal friend of his own ; and the letter and subsequent wire to Connolly McCausland emphasised the urgency of the matter, and the importance of there being no delay. It is quite clear that the necessity for expedition in the matter at the outset was due to the desire on the part of Mr. Maurice Marcus McCausland to have the documents completed and executed by him before he left for Evian-les-Bains in France, and at a later stage to the limited time available for stamping them without penalty.

Is it the law that in such circumstances as I have mentioned a young man, who had just been emancipated from the legal disability of minority, who had no knowledge or prior experience of legal matters and no independent advice, who had just embarked upon his military career and undertaken the responsibilities of a commissioned officer, must be held bound by all the terms of a lengthy and complicated deed of resettlement solely because of his having appended his signature to the deed, though it contained a clause, admittedly of an unusual or unreasonable character, of which he was never informed, and to which his attention was never directed, notwithstanding the adverse opinion of counsel as to the wisdom and propriety of including it in the deed ? If this were the law I should, indeed, deplore it ; but in my opinion it is not. I consider that Black J. has stated the law on this branch of the case with complete accuracy. It is to be found in the judgment of Sir John Romilly M.R., in *Hoghton v. Hoghton* (1), and has been re-affirmed or adopted by Lord Campbell L.C. in *Jenner v. Jenner* (2), by Lord Hatherley L.C. in *Turner v. Collins* (3), and by Kekewich J. in *Hoblyn v. Hoblyn* (4).

(1) (1852) 15 Beav. 278.
(2) (1860) 2 De G. F. & J. 359.
(3) (1871) L.R. 7 Ch. 329, 339.
(4) (1889) 41 Ch.D. 200, 207.

It must be admitted that the principles which are applied to family arrangements, such as a deed of re-settlement, are different to those applicable to transactions between strangers. The court takes a wider view of the matter, and considers the interests of the family generally, the reasonable and natural desire for the preservation in the family of the family property, the upholding of the family honour, and the maintenance of family peace and security. These it will, when possible, endeavour to uphold. Thus, the exercise of parental influence, if not undue or improper, or the mere absence of independent advice, where there is nothing unusual in the transaction, or where proper precautions are taken to explain it with adequate clearness and fullness to the son as tenant in tail, will not justify the court in making an order for the rescission or rectification of the deed. From the very nature of the transaction a re-settlement is, as Kekewich J. says "generally the father's work," and his is necessarily "the guiding hand." Such parental influence is both natural and good—that species of influence which springs from kindness and affection, not from terror, coercion or fear.

At the same time, the court, in exercising this salutary and beneficent jurisdiction, acts within well-defined limits. Thus one circumstance which the court has always recognised as warranting, though not necessarily compelling, a departure from the law or practice as stated above, is the acquisition of a benefit by the father to the detriment or prejudice of the son, for this changes the character of the re-settlement. The court will inquire jealously in such cases in order to ascertain if the bargain involving this benefit resulted from the exercise of undue influence by the father, without due regard to the necessity for the provision of adequate protection for the son. Lord Romilly expressed the opinion in *Chambers v. Crabbe* (1) that the slightest personal advantage to the parent who induced the transaction is sufficient unless it can be proved that the child knew the nature and effect of the transaction, and was not influenced by the

(1) (1865) 34 Beav. 457.

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

ANDREWS L.C.J.

relations in which they stood to one another. In the case of a direct benefit of this character the law properly imposes upon the father the burden of proving that the bargain was a fair one and was fairly made. There is no difference between the confidential relationship of solicitor and client on the one hand, and of parent and child on the other. See judgment of Lord Selborne L.C. in *Mitchell v. Homfray* (1).

The same principle, in my opinion, clearly applies where a clause of substance and importance is inserted in the re-settlement of which the son was not informed and of which he had no knowledge. *Hoblyn v. Hoblyn* (2) in one of its issues was a case of this character. It does not appear to me to be really material whether the defect be styled ignorance, non-disclosure, suppression or misrepresentation, if the responsibility for it lay with the father and the son is misled. The binding character of family arrangements, such as re-settlements, is dependent upon parties being on an equal footing as regards all material information, and this involves full disclosure and, where necessary, full explanation. The absence of such precautions involves risk. This is so even though there be no dishonest motive or intention. If parties are not on equal terms, and one of them stands in a fiduciary relationship to the other, the court requires a fuller and more explicit account of the matter than would otherwise be necessary.

Wright v. Vanderplank (3) is the only other case to which I propose to refer in this connection—a case of high authority in which the judgments of Knight-Bruce and Turner L.JJ. contain many well accepted principles. It was the case of a daughter executing a deed of gift of a life estate to her father soon after she attained twenty-one. Knight-Bruce L.J. conveniently sets out various grounds upon which such transactions might be impeached—that it was immoderate or irrational, that the solicitor had failed in his duty to the lady, that the deed was induced by suppression, misrepresentation, coercion, fraud or deceit, or that

(1) (1881) 8 Q.B.D. 587 592.
(2) (1889) 41 Ch.D. 200.
(3) (1856) 8 De G. M. & G. 133.

the lady executed it under mistake, misapprehension or ignorance (1). None of these he held, on the evidence before him, to be established ; but had it not been for acquiescence, to which I shall refer later, the learned judge would have held the plaintiff, who was the husband of the daughter and the person to whom her rights had devolved, entitled to relief on the ground of " the close attention, the strictness, and the jealousy " with which, upon principles of natural justice, and " upon considerations important to the interests of " society, the law of this country examines, scrutinizes, " and if I may borrow an old expression, weighs in " golden scales every transaction between a guardian " and his ward, or between a parent and his child, " which, including or consisting of a gift from the " younger to the elder, takes place so soon after the " termination of the legal authority, as that the ward " or child may, in consequence, probably be—not, in " the largest and amplest sense of the term—not, in " mind as well as person—an entirely free agent." Turner L.J., after expressing the opinion that such questions depend more on fact than law, stated his view of the law to be that " a child may make a gift " to a parent, and such a gift is good if it is not tainted " by parental influence. A child is presumed to be " under the exercise of parental influence as long as " the dominion of the parent lasts. Whilst that " dominion lasts, it lies on the parent maintaining the " gift to disprove the exercise of parental influence, by " showing that the child had independent advice, or " in some other way. When the parental influence " is disproved, or that influence has ceased, a gift from " a child stands on the same footing as any other gift ; " and the question to be determined is, whether there " was a deliberate, unbiassed intention on the part of " the child to give to the parent " (2). Whilst the present case is not one of a " gift " by a son to his parent in the strict sense of that term, yet the principles above enunciated would appear to me to be equally applicable to the present case in which the father obtained from his son an advantage or benefit in the

(1) Ibid. 136, 137. (2) Ibid. 146.

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

nature of this forfeiture clause which he obviously regarded as of the utmost importance, but which he never brought to the notice of the son.

In the present case the failure, as I hold, on the part of both the father, Mr. Maurice Marcus McCausland, and the solicitor, Mr. Ingram, to furnish any information to the son Connolly in regard to the inclusion of the "religion clause" in the deed would, even if there were nothing more, have been a grave omission ; it was doubly so when one remembers Mr. Longfield's obvious reluctance to prepare a draft of the clause which, when he did forward it, he advised was "unusual" and often "led to costly litigation." Mr. Maurice Marcus McCausland's relationship to his son had not wholly ceased to be of a fiduciary character on the day that the son attained the age of twenty-one years. Parental influence, so inseparable from most cases of family arrangement, was still present. In any event, from the dates of his visit to London, it is most probable that such conversation as he had with his son about the re-settlement was prior to the 11th July, 1927—the day upon which he came of age. In the matter of age, knowledge of legal matters, experience of the world and family relationship these parties did not stand to one another on equal terms ; and this in itself made it incumbent on the father to make a full disclosure. The knowledge which should be imparted must be "exact and complete," 23 Hailsham 84. Relief in such a case is not, in my opinion, dependent on the existence of intentional fraud.

But, it is argued, Connolly McCausland had a full opportunity of reading the re-settlement as well as the disentailing deeds for himself, if he so desired, in the office of the London solicitors before he executed them, and that he ought therefore to be bound by them. Here again the judgment of Romilly M.R., in *Hoghton v. Hoghton* (1), comes to our aid in a passage cited by Black J., but which I must here repeat :—"The mere "reading over of a deed would not be sufficient to "satisfy me that the person hearing it read understood "it. To an unprofessional person, however intelligent,

(1) (1852) 15 Beav. 278, 311.

"and exerting the closest attention, the long and "involved sentences and technical language of a deed "render it frequently unintelligible; and even the "Court not infrequently misapprehends the limitations "and effect of the provisions of a deed read in open "Court, where the greatest pains are exerted to read it "clearly and intelligibly. In my opinion, unless it is "accompanied with an explanation of the contents of "a deed, the reading over to an unprofessional person "is more likely to confuse than to enlighten him." In my opinion it is almost an *a fortiori* case when a young man with no legal training or experience was left entirely to his own resources to endeavour to fathom what must have been to him the gloomy and confused depths of legal phraseology. It is not surprising that he soon tired in the struggle, and signed the deeds without any explanation, and without knowing that this "religion clause" was contained in the re-settlement. In a word the general nature of this re-settlement deed, with its many and complicated provisions, including, in particular, clause 15, was such as to demand the most careful explanation by a duly qualified legal adviser; and this, in my opinion upon the evidence, Connolly McCausland never received.

In my opinion, therefore, apart from any question of acquiescence, laches or subsequent ratification of the deed, Connolly McCausland was entitled to relief from a forfeiture clause, so unusual in its character, and so drastic in both its conception and its form, that its full effect—the disentitling of the issue of a Roman Catholic—was never understood or appreciated by *either* the father or his son.

The next question—and the one which, perhaps, presents the greatest difficulty in the case—is whether the plaintiff, Connolly McCausland, has been deprived of his right to relief by his subsequent conduct. Did he, with knowledge of the existence of the forfeiture clause and of his rights, so acquiesce in it, or so accept its terms, that he must be taken to have confirmed or ratified it, and to have abandoned any legal or equitable claim which he may have been possessed of in respect thereof?

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

For a proper appreciation of this issue it is necessary in the first place to consider the material facts, and, in particular, the somewhat lengthy correspondence which is in evidence ; and, subsequently, to apply the law as it appears in settled authority.

The first date upon which we have any evidence of Connolly McCausland having been brought into contact with the re-settlement of 1927 subsequent to its execution is 1932, when, shortly before his marriage, the terms of his marriage settlement were under consideration. Nothing of importance arises in any discussions which took place prior to March of that year when, according to Mr. Ingram's office entry, he, Mr. Ingram, attended both Connolly McCausland and his father, and the former read and approved of the proposals for the settlement, and was given a copy of same. Connolly McCausland admits that he received this document, took it away with him, and kept it for quite a long time. He admits that he read it later, in the summer after his marriage, but he denies that he read it at the meeting. The materiality of this part of the evidence is that the first paragraph of these proposals, in a brief reference to the terms of the re-settlement of 1927, ends with the words, " All such " limitations being subject to certain clauses as to " bearing the name and arms of McCausland and change " of religion which are contained in the deed." On his direct examination Connolly McCausland admitted that the words " change of religion " brought to his mind Roman Catholic, and he felt that it might be his change of religion, or that he was not to marry a Roman Catholic. He added : " I felt that as long as " my father was alive, and I changed my religion, and " he disapproved of the change, he could cut me off " from all things in which I hoped to follow him. I " didn't think it had anything to do with my wife and " children, certainly not my children."

I shall not, however, examine this evidence further ; for I agree entirely with Black J. that there is nothing in it which, taken alone, would justify a finding that Connolly McCausland understood or had explained to him at the time of this marriage settlement the precise

terms or the effect of the religion clause; and, if it be said that he had at least sufficient notice to make it reasonable that he should have enquired further into the matter, it may fairly be urged in reply not only that he was under no legal compulsion to make such enquiry, but also that the clause had no direct relevance to the matter which he then had in hand—his marriage settlement—more especially as he tells us that at the time of his marriage he had no intention of joining the Roman Catholic Church. The matter would, therefore, at that time have had for him at most an academic interest; and, whilst this evidence relating to the year 1932 cannot be wholly ignored, one would not in my opinion be justified in holding that Connolly McCausland had acquiesced in or confirmed the re-settlement merely because, with insufficient knowledge of the facts, he did not consider it desirable to prosecute any further enquiry into a matter which, as we now know it, might have brought him into serious conflict with his father.

Next in point of time comes the interview which took place at the Bank of England in November, 1939, between Connolly McCausland and his brother-in-law, Lucius Thompson. There is some discrepancy in the evidence of these two parties as to what precisely passed between them on that occasion. This is not altogether to be wondered at when one remembers that several years had passed before they were called upon to state their recollections in court. Black J. prefers the evidence of Lucius Thompson where, as here, it is in conflict with that of Connolly McCausland. He had the advantage of seeing and hearing the witnesses, and I have no hesitation in accepting his conclusion upon that point. Indeed, from a very careful perusal of the evidence and correspondence, I have not the slightest doubt that, had I been the trial judge, I should have formed the same opinion. Never was I more impressed with correspondence in any case that has come before me than I have been with the tone and Christian spirit of Lucius Thompson's letters. They are, indeed, the letters of a high-minded, honourable English gentleman, who evidently preferred the happiness of his family home to all the McCausland

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

property, with the material advantages, but also with the serious responsibilities which its possession would necessarily entail. Strangely enough, however, it is this very friendly, responsive spirit which adds to our difficulty in the present case ; for it seemed to be wholly foreign to his nature to turn a deaf ear to any proposal that was made to him or his wife by Connolly McCausland. The issue which I am at the moment considering would have been much simplified had the parties been at arm's length.

However, to revert to the interview of November, 1939, which, it is said, lasted about two hours, Connolly McCausland "unburdened himself" to Lucius Thompson on the religious matter ; and, as the latter said in his evidence, he had always recollected the mention in the conversation of the religion clause in the settlement. This clause had been read out to him when his own marriage settlement was signed about April, 1930 ; and he, accordingly, advised Connolly McCausland to look into it before he took any action. Lucius Thompson was, however, himself labouring under a misapprehension at that time. He thought that if Connolly McCausland was dispossessed of the property by the clause it would pass to his (Connolly McCausland's) son. It never occurred to him that it would "go his way," i.e., to his wife or family. For this reason I am clearly of opinion that it is impossible from that interview along to fix Connolly McCausland with full knowledge of the meaning and scope of the religion clause. It might certainly, as Black J. says, have put him on enquiry as to its contents and provisions ; but, further than that, it is only material as undoubtedly fixing Connolly McCausland for the second time at least with knowledge of the existence of *a* "religion" clause. For this reason it is a circumstance which cannot be ignored.

It was in these circumstances, and to this extent alive to the dangers from the material standpoint of the step which he was taking, that Connolly McCausland was admitted to the Roman Catholic Church six months later, namely, on the 3rd May, 1940. It is not irrelevant to note that for some reason or other he

kept the news of the important step which he had taken to himself, possibly because he thought it would not meet with family favour, possibly because he was apprehensive of the consequences which might ensue to his interest under the settlement in the family estates. However this may be, it appears clear from an attendance which Mr. Ingram had upon Connolly McCausland's mother on the 19th July following that even she was unaware at that time of his admission to the Roman Catholic Church ; she merely "feared that he might "be induced to join it." When she had read to her by Mr. Ingram the religion clause in the re-settlement, and appreciated that, if her son came within its provisions, not only he but his children would forfeit their claim to Drenagh and the settled property, she said that she would write to him ; but she had not done so when, on the following day, Mr. Ingram further informed her that, if any such change of religion occurred, it would be the duty of the trustees to hold the property in trust for his sister, Mrs. Helen Thompson, and her sons ; and that, even if Connolly McCausland should later revert to his original religion, the lost property could not be recovered. She said she would write to him to that effect. Connolly McCausland admits that she did write to him and he fixes the date of the receipt of her letter as the 24th or 25th July ; but, unfortunately, this letter, which would have been most important as to the knowledge which it imparted, is not forthcoming. It is for this reason that I have referred, with some particularity to the office entries of Mr. Ingram's attendances upon Mrs. McCausland (who, not unnaturally, was not called as a witness) as affording the best evidence available of the probable contents of the letter. In passing I may say that, in view of the matters to which I have referred above, I have difficulty in accepting without considerable qualification Connolly McCausland's testimony that he first knew that there was something in the deed which affected him in regard to religion when he received this letter from his mother.

However, all doubt as to Connolly McCausland's knowledge of the nature and scope of this "religion"

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

ANDREWS L.C.J.

clause appears to me to be set at rest by an office entry of Mr. Ingram's of the 18th August, 1940, when he attended Connolly McCausland and advised him fully as to the results which would follow under the provisions of the re-settlement in the event of his becoming or professing to be a Roman Catholic, and when Connolly McCausland read some sentences from an opinion which he had obtained from Mr. Arthur Cole, a member of the English Bar. At a further attendance on the following day Mr. Ingram again advised caution against taking any action without further serious and careful consideration of the religious question, and, if necessary, obtaining further legal advice, as Mr. Ingram thought that *Hoblyn v. Hoblyn* (1) which had been referred to by Mr. Cole, did not support the view that the re-settlement would be altered by the court. The accuracy of these entries is not challenged in any material respect by Connolly McCausland. Immediately after that interview Connolly McCausland consulted Mr. Currie who has since remained his solicitor in Northern Ireland, and who appears for him in this action.

It will have been observed that at neither of these important interviews, which followed and were doubtless consequent upon his mother's letter, did Connolly McCausland disclose to Mr. Ingram that he had been actually received into the Roman Catholic Church some three and a half months previously. This was a strange omission ; and it certainly displayed a very remarkable want of candour on the part of one who came to the family solicitor seeking information, and receiving from him legal advice. One naturally asks oneself, even at this stage, what was the reason for this reticence. It is suggestive of a greater, and, perhaps, an earlier knowledge of his legal position than he would wish us to accept, and of the consequences which might naturally result from a full and candid disclosure.

In the circumstances it was left for Mr. Ingram to write to Connolly McCausland on the 19th September, 1940, stating that, in view of the persistent rumours

(1) (1889) 41 ChD. 200.

that he had already changed his religion, he (Mr. Ingram) thought it his duty, as a trustee of the settlement of 1927, to ask whether he had in fact become a Roman Catholic. To this letter Connolly McCausland replied on the 27th September that he was a Roman Catholic, having been received into the Church on May 3rd last ; adding to this admission the very pregnant words : " I had always hoped that you would not ask me this " question, but I realise that you have acted as your " own conscience dictated." In a subsequent paragraph in his letter Connolly McCausland wrote : " You " will realise that more is at stake than the disinheriting " of one individual, for there are other people involved " who have no more thoughts of embracing Catholicism " than you have, and these would be made to suffer, " and will in fact suffer now, unless this forfeiture " clause can be set aside." He added that he had decided to take the advice of a London counsel, and that he had already seen Mr. Currie.

Mr. Ingram acted promptly in his reply of the 3rd October, 1940, expressing his distress at the news ; and stating that he had written to Mrs. Helen Thompson, to whose credit all dividends and rents would be placed, an apportionment being made up to the 3rd May. Mr. Ingram also decided on the same day to get the opinion of an eminent counsel, Mr. Hewitt Poole, as to the duties and responsibilities of the trustees. Connolly McCausland was, not unnaturally, so concerned with the contents of Mr. Ingram's letter, that he immediately came across, and had an interview with Mr. Ingram on the 9th October, to discuss the possibility of a compromise ; but Mr. Ingram held out no hope of the trustees having power to enter into any negotiations for a settlement. Connolly McCausland then stated, according to Mr. Ingram's entry—and this is a very important matter as showing his then attitude of mind—that he would be willing to forego any personal claim if the succession of his son Marcus could be assured. He added that he had never heard of the religion clause till the terms of his own marriage settlement were being discussed in 1932, and that he did not realise (i.e., that he did not realise at that time)

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

that a forfeiture would affect his family. If the accuracy of this entry be accepted—and there is no reason to doubt it—it would be a reasonable inference that as long ago as 1932 he did know that the religion clause would affect himself if he became a Roman Catholic.

In January, 1941, Connolly McCausland also sought the legal advice of the well-known firm of solicitors, Messrs. Charles Russell & Co., of London, who wrote to Mr. Ingram for certain documents which their counsel wished to see, and which were immediately forwarded. Months passed without any definite decision; and, accordingly, on the 3rd May, 1941, Mr. Ingram wrote to Messrs. Charles Russell & Co. that his firm presumed that the contemplated application for alteration of the re-settlement had been abandoned. He asked, accordingly, for the return of the documents. To this letter Mr. Ingram received a reply that the matter was still under consideration. A further letter of the 8th August, 1941, from Mr. Ingram, requesting the return of the documents, was answered by Messrs. Russell on the 11th August in a letter which stated that they were writing to their client to obtain his instructions as to whether he desired to take any further steps in the matter; if not, the documents would be immediately returned. The importance of this letter lies in the fact that on the 5th September, 1941, the documents were returned. The legitimate inference from this action would naturally be that all thought of court proceedings by Connolly McCausland had been abandoned. However, when Mr. Ingram so expressed himself in his letter of the 8th September, 1941, Messrs. Russell replied on the 18th September that they were afraid they could not give an answer to that; but that they did not think that Connolly McCausland had come to a final decision in the matter.

On the 9th September, 1941, Lucius Thompson wrote to Connolly McCausland a very long letter in the course of which he pointed out his wife's inability to do anything which disregarded the interests of her sons, who were minors, in the succession, and also her

own personal limitation of action by reason of the proviso against anticipation. There was, he continued, no middle way between accepting the settlement of 1927 and going to the court to have it set aside ; that if he (Connolly) decided to go to the court his (Lucius Thompson's) wife and he would do nothing to defend the settlement beyond the minimum which they were apparently compelled to do as guardian of their children's interest under it ; and that Mr. Ingram had said that if he did decide to go to the court he should do it soon ; *otherwise he might prejudice his case by apparent acquiescence.* Connolly McCausland's reply of the 14th September shows a distinct reluctance to proceed, apart at any rate from "a quiet family "arrangement." Life in the altered circumstances would not be easy for him at Drenagh. There would be a lot of difficulties and misunderstandings to contend with. "As to bringing a case," he wrote, "I am not "keen to do so since I have taken the best legal opinion "which I could get on the subject, and this opinion is, "on the whole, against it. . . If I brought a case I "might so easily lose it and have heavy costs to pay "as well. So you see the law apparently upholds the "settlement *as we all realise now.*" These words, followed, by an acceptance of Lucius Thompson's attitude that there was "no middle way" between accepting the settlement and fighting to get it set aside, fairly represent the general tenor of the whole letter, with the exception of portion of one paragraph near its close in which he wrote : "You must never "think that I hold anything against you, either of you, "over Drenagh whatever may happen in the future ; "but I would be a hypocrite and worse if I did let (*sic*) "you understand that, if ever the law changes or the "administration of it in that part of our country ceases "to lie in the hands of those who now control such "matters, I would appeal the case supposing it to go "against me (a foregone conclusion) in the present "issue." Let me say at once that I attach no importance whatever to this unmeaning reservation, if it be intended as such—an attempt, if it means anything, to keep the matter open indefinitely, or as he

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

says, for " ever " until there might be a change in the law or its administration.

Connolly McCausland left the witness-box without assigning any meaning to these qualifying words in his letter; and in his argument before us Mr. Nicholson could only explain them by attributing them to the presence of those " midges in his hair " to which he had referred in an earlier part of his letter. Whatever the words meant, or were intended to mean, and whatever the event may have been which Connolly McCausland had in mind when he wrote them, it is not argued that that event has ever occurred.

On the 17th November, 1941, Lucius Thompson, in the course of a further friendly letter to Connolly McCausland, said : " So would you write as soon as you " can to Ingrams (if you still think fit) and say that " you are not going to bring an action, but accept the " settlement." This was, in my opinion, a reasonable request. A year and a half had elapsed since Connolly McCausland had become a Roman Catholic, and yet, by the introduction of those ambiguous—I might say unmeaning—words in Connolly McCausland's letter of the 14th September, Lucius Thompson felt there was, perhaps, some room, however small, for uncertainty which must be removed, not only for his own and his wife's peace of mind, but also in the interests of the estates. In reply to Lucius Thompson's request Mr. Ingram received from Connolly McCausland a letter, dated the 18th November, 1941, which in my opinion, properly understood, is the most important letter in the case upon this issue.

The material part of the letter is contained in the first two paragraphs, and reads as follows : " I am " writing to tell you that I no longer feel myself in a " position to bring an action in the courts against the " re-settlement of 1927."

" I do wish, however, to make it perfectly clear that " by ' accepting ' the settlement I hope to make things " easier for you and the other trustees ; and I do not " wish to prejudice any re-opening of the case by me " or my descendants at some future and more favour- " able time."

This letter, read in conjunction with the earlier correspondence and with the statement in Lucius Thompson's evidence that on the 1st November, 1941, Connolly McCausland had told him that he was not going to take proceedings, leaves no doubt in my mind that Connolly McCausland, acting on the advice which he had received both in England and in Northern Ireland that legal opinion was against him, had definitely, to quote his own words, "*accepted* the "settlement," and abandoned any idea of instituting contentious proceedings, or, as he expressed it, "an "action . . . *against* the re-settlement"—to have the re-settlement set aside in whole or in part; but that he still harboured the hope that, although the settlement stood, and must stand, yet at some future indefinite date, possibly, as Lucius Thompson had himself indicated, when his (Lucius's) son Mark had come of age and could act for himself, it might be possible, wholly apart from legal rights, to effect an amicable arrangement, by re-settlement or otherwise, under which he or his descendants might be restored to the inheritance. In this way, and in this way only, as it seems to me, can the two paragraphs in the letter be reconciled with one another, and the letter be made into one consistent whole. Any other interpretation would involve a claim on the part of Connolly McCausland to an indefinite postponement of decision —a claim which the law would not recognise. Further, any other interpretation would not "make things "easier," as Connolly McCausland had expressed the hope that he could do, for Lucius Thompson and the trustees; he would only make them more difficult. In my opinion, accordingly, Mr. Ingram was perfectly justified in replying to Connolly McCausland on the 25th November, 1941, to the effect that he was glad that Connolly would not proceed with the suggested application to the courts for the alteration of the settlement, which he had always felt sure could not be successful. A few days later—the 1st December, 1941—Mr. Ingram, in writing to Helen Thompson again clearly showed the interpretation he had put upon Connolly's letter when he used the words: "Now "that you are in undisputed possession."

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

If Mr. Ingram was wrong in placing this—to my mind the obvious—meaning on Connolly McCausland's words the latter should at once have so informed him. However, he did not do so; and then there follows a series of acts either on his part, or, to his knowledge, on the part of the trustees, which in my opinion are consistent, and consistent only, with Connolly McCausland's complete acquiescence in and acceptance of the settlement. I shall only briefly summarize them :—

(1) The payment as from the 1st November, 1940, of rents and profits by the trustees to his sister Helen Thompson, who had succeeded to the estates. Strictly speaking, there should have been an apportionment of these rents and profits as of the 3rd May, 1940; but by the direction of Lucius and Helen Thompson the later date was substituted in Connolly's case.

(2) The sum of £6,000, payable under clause 13 of the re-settlement to Eileen McCausland (Eila) in the event of her sister Helen becoming entitled in actual possession, was raised by the trustees by an indenture of sub-demise of the 25th June, 1942, as Connolly was informed and well knew they were proceeding to do.

(3) Succession Duty in the sums of £131 16*s.* 4*d.* and £333 11*s.* 9*d.* was paid by Helen Thompson on her succession to the property real and personal respectively.

(4) Repayment of the greater part of the Succession Duty paid by Connolly McCausland on his succession after his father's death was applied for and obtained, to the amount of £454 5*s.* 9*d.*, on the basis of his interest having determined after two years and four months from the date of his entry into possession, instead of after the number of years when it had been estimated that his death would occur. The claim for repayment of this duty was grounded on an affidavit by Connolly McCausland to the effect that he had forfeited his estate, and that his succession had extended only to the 3rd May, 1940. "Please "do all that you can," he wrote to Mr. Ingram, "to

"recover what you consider a fair and just amount." Here is an unambiguous affirmative act, and a statement on oath by Connolly McCausland in unqualified terms, which admit of no meaning or explanation save one—his estate had been determined by reason of the forfeiture effected by the religion clause contained in the re-settlement.

(5) An agreement was entered into for the sale by Connolly McCausland to his sister of stock, crop, agricultural implements and certain pictures and furniture, etc., for the sum of upwards of £9,000. Connolly's own suggestion contained in his letter to Mr. Ingram of the 24th January, 1942—a letter, which I may say parenthetically, is consistent only with finality in regard to legal rights—was that these goods and chattels should be leased to his sister for ten years from the 17th February, 1942, at the end of which time, as he stated, Mark, his sister's eldest son, would be "of age" and the mother and son would "presumably have to re-"settle." This was a proposal absolutely inconsistent with the institution of proceedings to rescind or to rectify the settlement. It was an express recognition of his sister's and her son's rights, but the visualising at the same time of the possibility of him or his son being restored to the inheritance as the result of a new re-settlement which would omit the religion clause. I regard the proposal also as strongly corroborative of my interpretation of Connolly McCausland's letter of the 18th November as to what might be effected by friendly negotiation after Mark came of age. The proposal that there should be a re-sale at the same valuation (or, if less, at the market value) in the event of Connolly McCausland becoming life tenant, does not affect my conclusion as to legal finality. It only illustrates what might result from friendly negotiation at some indefinite date in the future. Ultimately a sale was agreed to, Connolly McCausland writing to Lucius Thompson on the 25th March, 1942: "I think it is better for all concerned, you, us, the Lowdens (Land Agent) and Drenagh itself, if we do sell out and *depart* (*in peace*)."

C.A. 1949.

McCausland and Others v. Young and Others.

Andrews L.C.J.

(6) Next there was a proposal for the granting to Connolly McCausland by his sister of an agricultural lease for a period of ten years, subject to the right of either side to break on one year's previous notice at the end of five years in case the arrangement did not prove to be a success. Such proposal was obviously based upon a transfer of interest consequent upon the forfeiture of Connolly McCausland's estate.

(7) The sale by Connolly McCausland to the trustees in October and November, 1942, of his own unsettled lands for the sum of £2,688, when it appeared that the proposed "dual control" of the lands might lead to trouble and difficulty, and that all the lands could be worked more conveniently together.

On a somewhat different basis, but not irrelevant to the issue into which we are enquiring, rests the assumption by Thompson of the name of Thompson-McCausland, in reference to which Lucius wrote to Connolly McCausland on the 14th June, 1942: "I am "only one of those concerned. Helen, *who has now* "*succeeded to the McCausland Estates*, is a McCausland."

All these several acts are, in my opinion, properly relied upon by the trustees as either indicating Connolly McCausland's state of mind in regard to his acceptance of the re-settlement and abandonment of any claim, or as involving a loss or detriment to his sister directly resulting from the change in her position. Taken collectively they unequivocally treat the religion clause as a subsisting part of the re-settlement which had already worked a forfeiture. They are deeds which speak stronger than words, and deeds which are in my opinion not only inconsistent with a mere temporary arrangement, but are strongly confirmatory of the interpretation which I have placed on Connolly McCausland's letters in the foregoing pages.

What, then, is the law of acquiescence and laches? Acquiescence may arise whilst an infringement of legal rights is actually taking place, or it may result from the failure to seek redress or remedy when a violation of his rights, unknown to a party at the time,

is brought to his notice. It is acquiescence in this second sense which is relied upon in the present case—an element in laches operating by way of estoppel. The principle underlying the doctrine of laches, as I understand it, is that in a court of equity, assuming there to be no statutory bar, a person is bound to prosecute his claim with reasonable diligence and without undue delay. The mere assertion of a claim will not suffice. The special circumstances of each case must, of course, be considered, especially the plaintiff's acquiescence as a free agent after he has acquired knowledge of the facts and of his rights. A change in the position of the party alleging acquiescence as a consequence of the other party's conduct is also always a most material and relevant circumstance. "Acquiescence," said Turner L.J. in *Life Association of Scotland v. Siddal* (1), "imports knowledge, for I do "not see how a man can be said to have acquiesced "in what he did not know, and in cases of this sort I "think that acquiescence imports full knowledge, for "I take the rule to be quite settled that a *cestui que* "*trust* cannot be bound by acquiescence unless he has "been fully informed of his rights and of all the material "facts and circumstances of the case."

But when one speaks of "knowledge of rights" it is not in my opinion to be understood that a party must know the full and precise relief to which he is entitled. That is something which, in a difficult and intricate case such as the present, would only be known with certainty after the termination of proceedings in the highest court. He must, however, have "sufficient "knowledge of the facts which constitute his title to "relief": see the judgment of Sir Barnes Peacock in *Lindsay Petroleum Co. v. Hurd* (2); and, generally speaking, when the facts are known from which a right arises, the right is presumed to be known: *Stafford v. Stafford* (3). No doubt it has been held that, if mistaken as to his rights, a person is not guilty of laches until he has discovered the mistake, or had

(1) (1861) 3 De G. F. & J. 58, 74.
(2) (1874) L.R. 5 P.C. 221, 241.
(3) (1857) 1 De G. & J. 193, 202.

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

ANDREWS L.C.J.

reasonable means of doing so. In this respect the law as to laches in courts of equity differs from that at law where a claim is barred by the Statute of Limitations : see the judgments of Alderson B. in *Brooksbank v. Smith* (1), and of Hamilton J. in *Baker v. Courage & Co.* (2). In my opinion in the present case Connolly McCausland, with all papers furnished to his legal advisers which they required, and with such competent lawyers both in London and in Northern Ireland to advise him, had not only "reasonable "means," but the most ample opportunity of inquiring into and of ascertaining his rights.

Wright v. Vanderplank (3) to which I have already referred for another purpose, is also an illuminating authority on this branch of the case. The court there held acquiescence to be established on facts not, of course, identical with the present, but which, taken in their entirety, do not appear to me to be appreciably, if indeed, at all stronger than those with which we have to deal. It, accordingly, refused to set aside a transaction in the nature of a deed of gift by a daughter, who had recently attained the age of twenty-one years, to her father, which otherwise would have been impeachable. What the court looked at was the acts and conduct of the parties, including the intention to treat and deal with the property as bound by the life estate which the deed conferred on the defendant. Turner L.J. expressed the clear opinion that a positive act (such as, in my opinion, we have in the present case) was not necessary to render the transaction unimpeachable by acquiescence ; and that all that was required was proof of "a fixed deliberate and unbiassed determination that "the transaction should not be impeached." I fully appreciate, as was pressed upon us by plaintiff's counsel, that the words of the learned Lord Justice are strong ; but in my opinion the present case is brought within them not only by Connolly McCausland's letters and conduct immediately subsequent to his admission that he had become a Roman Catholic, but also by his consenting to his sister Helen entering into

(1) (1836) 2 Y. & C. Ex. 58.
(2) [1910] 1 K.B. 56, 63.
(3) (1856) 8 De G. M. & G. 133.

receipt of the rents and profits, and by his several other acts and submissions to which I have referred. In my opinion such conduct on Connolly McCausland's part constitutes not merely an unequivocal act, but a series of unequivocal acts, which are consistent only with a fixed and final determination on his part to abandon any claim *as of right* to the property comprised in the re-settlement.

The statements of the law in regard to acquiescence and laches which I have made have not only a general application, but they appear to have a special application to a case of this nature in which rescission or rectification is sought, and which is one of a well recognised class of cases in which the law required special promptitude in the advancement of a claim to relief because of the probability of the other party to the contract altering his position on the faith of the contract standing. *Turner v. Collins* (1) affords a good illustration of the danger of delay in such a case. Lord Hatherley L.C. there speaks of the importance of the court watching over and protecting those who are placed in a situation to require protection as against the acts of those who have influence over them, by which acts the person having such influence obtains any benefit to himself; but he adds that *Wright v. Vanderplank* (2) goes a long way to show that, if the intention to set aside such a deed exists, it should at once be put into execution. When the facts are known and the influence has ceased, the court, in fairness to other parties affected, expects promptness in the assertion of rights and in proceedings for their enforcement. To the like effect are the words of Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.* (3): "A Court of Equity requires that those who "come to it to ask its active interposition to give them "relief, should use due diligence, after there has been "such notice or knowledge as to make it inequitable "to lie by. And any change which occurs in the

(1) (1871) L.R. 7 Ch. 329, 338, 341.
(2) (1856) 8 De G. M. & G. 133.
(3) (1878) 3 App. Cas. 1218, 1279.

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

ANDREWS L.C.J.

"position of the parties or the state of the property "after such notice or knowledge should tell much "more against the party *in mora* than a similar change "before he was *in mora* should do."

Delay has, to my mind, a special significance in the present case, in which Connolly McCausland had been informed that there was "no middle way" between accepting the re-settlement and going to the court to have it set aside, and in which he had been told of Mr. Ingram's view that if he did not go to the court soon he might prejudice his case by apparent acquiescence. With such a warning Connolly McCausland had, in my opinion, no right to assume that the indulgent attitude of his sister and brother-in-law would continue indefinitely, wholly irrespective of any trouble and expense which they might incur. It would be monstrously unjust to them in the circumstances to say that their actions were consequent upon a mere temporary arrangement, yet one of indefinite duration, of which there is no evidence. When it is urged that the institution of the present proceedings is evidence that Connolly McCausland at least understood any arrangement to be of a merely temporary character, I can only say that this argument is, to me, quite unconvincing. There was, in fact, no such arrangement; and in my own mind I much more directly connect the issue of the writ in June, 1944, when the war, be it remembered, was still at its height, with the report in the Appeal Cases of 1943, of the case of *Clayton v. Ramsden* (1), which was so strongly relied upon by Connolly McCausland's counsel in the earlier branch of the case.

For the reasons stated I am of opinion that acquiescence in the deed on Connolly McCausland's part is fully established; and that it would be a grave injustice to permit him now to change his whole attitude in the matter; and in an action, instituted a year after Mr. Ingram's death, to assert rights "against the "re-settlement" which, on my interpretation of the facts, he had definitely abandoned both by his own word and deed, and by acquiescence, without protest, in the word and deed of others.

(1) [1943] A.C. 320.

The next matter which remains to be considered is the extent, if at all, to which Connolly McCausland's son and co-plaintiff is affected by his father's acquiescence. No conclusive authority was cited on either side during the argument, and accordingly the question must be determined on principle. The learned Attorney-General contended strenuously on behalf of the trustee that the issue does not properly arise on the pleadings, and that it was merely as an afterthought that Mr. Nicholson, towards the close of his argument in reply before Black J., sought to differentiate between the positions of Connolly McCausland and his son on the question of acquiescence, with the result that it did not receive, as he submitted, sufficient argument and consideration. I am not prepared to say that the issue is not open on paragraphs 29, 38, 39 and 40 of the trustee's defence, in which I regard the varied use of the words " plaintiff " and " plain- " tiffs " as not accidental, but as the deliberate act of the pleaders amply justifying a submission of differentiation of rights. The provisions of Order xix, rule 14, excepting admissions as against infants, and of Order xix, rule 26, rendering it unnecessary for a party to allege matters which the law presumes in his favour, or as to which the burden lies on the other side, also support the minor plaintiff's right to have the matter determined ; and, fully argued, as it had been in this court, its determination cannot be evaded by any member of the court who holds the view, as I do, that Connolly McCausland's rights were barred by his acquiescence and laches.

My view on this issue may be briefly stated. Connolly McCausland's right to a rectification of the deed, apart from his acquiescence, I have held to be established. Such rectification would have enured for the benefit of his eldest son and others having interests in remainder. Such eldest son, who was and is an infant, had, in my opinion, his own independent right of action which he could have maintained either alone or, as in the present case, jointly with his father. No doubt such eldest son must be regarded as only a volunteer, and authority is lacking in regard to a volunteer's right of action for

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

ANDREWS L.C.J.

rectification in a case of this nature ; but Black J. has referred to several cases, which I need not occupy time in examining closely here, in which the volunteer's right to institute proceedings has been recognised. It is said that they are all cases of breaches of trust, but I know of no reason why the appropriate remedy should not be applied to a case of this character. Black J. has illustrated the injustice which might result, were the law otherwise, to a remainder man, if a settlor in the position of Connolly McCausland dies shortly after a settlement, containing an unauthorised or otherwise unwarranted provision, had been executed, and before it could be rectified. Another illustration of a like injustice would be provided if such a settlor, to the prejudice of a remainder man who was a pure volunteer, accepted a personal benefit or advantage financial or otherwise, as a consideration for his not seeking the rectification to which he was entitled.

Now, on the assumption that Connolly McCausland's son possessed such a right it could not be lost or prejudiced in any way by his personal acquiescence, both because, presumably, he had no knowledge of the facts or of his rights, and also because, as a matter of law, there can be no acquiescence by an infant, and laches will not be imputed to a party whilst under such disability : *March v. Russell* (1) and *Young v. Harris* (2). If this be so, it would, indeed, seem to me to be incomprehensible that such infant should be so adversely affected, as to be deprived of his rights by the acquiescence of another, namely, his father. Acquiescence operates by way of estoppel. It is a personal bar to relief. In *Butler v. Carter* (3), acquiescence in a breach of trust by a tenant for life, who had brought the funds into settlement, did not bind a remainder man. Acquiescence is dependent in each case on knowledge, capacity and freedom ; and, as these vary from one individual to another, it would in my opinion be impossible in law to impute the acquiescence of one party to another, especially when that other was under

(1) (1837) 3 My. & Cr. 31.
(2) (1891) 65 L.T. 45.
(3) (1868) L.R. 5 Eq. 276.

legal disability. The importance of this view is well illustrated in the facts of the present case, in which the infant son might well be regarded on the merits of the case as having even a stronger case of rectification than his father by reason of the introduction into clause 15 of those two concluding words—"without issue"—which so directly affected his legal rights. I think it must have been the view of Mr. Poole that Connolly McCausland's son had a right to maintain suit when, before any question of acquiescence had arisen, he expressed the opinion that Connolly McCausland *and his infant son* might make a strong case for modification of the re-settlement.

One last question remains—the issue raised in argument as to whether the plaintiffs' remedy, if any, lies in rescission or rectification of the re-settlement. I do not propose at the end of this already too lengthy judgment to refer to all the cases cited. Suffice it to say, that I find in the case of *Hoblyn v. Hoblyn* (1) ample authority for remedy by rectification: see the judgment of Kekewich J. at pp. 207 and 213. *Lovesy v. Smith* (2)—a marriage settlement case—would afford an earlier illustration, if such were needed, of the court's power to rectify a deed, where the plaintiff did not rely on any mutual mistake, but rather on a violation by her husband of the agreement or understanding which had been come to between her and him prior to the execution of the deed: see the interlocutory observation of Denman J.

In the present case to set aside the deed *in toto* would be as in *Bentley v. Mackay* (3), "to undo what "had been acted upon for many years." The allegation of mistake, misrepresentation or equitable fraud, by whatever name it be called, has been entirely directed to the forfeiture clause. This was a clause super-imposed, as it were, on the contract by Connolly McCausland's father, without, as I have held, Connolly's knowledge or consent; and, from its very character, and from the manner in which it was introduced into the re-settlement, it is in my opinion, severable from

(1) (1889) 41 Ch. D. 200.
(2) (1880) 15 Ch. D. 655, 659.
(3) (1862) 4 De G. F. & J. 279, 286, 287.

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

ANDREWS L.C.J.

the real contract contained in the rest of the deed. This is in my opinion the complete answer to the argument that this forfeiture clause was only part of the bargain, and that, if that part went, the whole should go. To rescind the whole deed after it had been in operation for twenty years, would produce a state little short of chaos, and an injustice far greater than that which exists with the deed as it stands ; for it must be borne in mind that the disentailing deeds were part of the same transaction with the re-settlement, and that the principal settlor, Connolly McCausland's father, is long since dead. The judgment of Turner L.J., in *Bentley v. Mackay* (1), in my opinion fully supports the view which I have expressed—a conclusion which is, indeed, irresistible as providing the only possible solution of our difficulties, if I am right in holding that Connolly McCausland has lost or waived his rights by acquiescence, and that he is, accordingly, himself bound by the terms of the deed.

For the reasons stated I am of opinion that clause 15 is not binding on the plaintiff, Marcus Edgcumbe McCausland, or on any person entitled in remainder to him under the limitations contained in the re-settlement, and that the said re-settlement should be rectified accordingly.

In my opinion the order of Black J. should be affirmed in all respects, including the declaration that the provisions of clause 15 do not apply to the jointure rent charge appointed to the plaintiff, Margaret Louisa McCausland (in the event of her surviving her husband Connolly McCausland) by the marriage settlement of the 6th June, 1932. The appeal against this declaration was unsustainable, and was expressly abandoned in this court.

BABINGTON L.J.

BABINGTON L.J. [dealt with the facts of the case and continued] : It was contended that the forfeiture clause (numbered 15 in the deed of re-settlement) was void for uncertainty, but Black J. rejected this argument and I agree with his decision. He admitted the evidence of two Roman Catholic canonists who were

(1) (1862) 4 De G. F. & J. 279. 286. 287.

called to prove the various ways in which a person can become a Roman Catholic according to the law of the Church, and the difficulty of averring with certainty that a person either is a Roman Catholic or that he professes the Roman Catholic religion. This evidence was objected to and I have considerable doubt as to whether it was properly admitted.

Most of it deals with matters with which the court is not concerned and should have been rejected, but as the trial judge has held that neither the words "professing the Roman Catholic religion" nor the words "shall become a Roman Catholic" are void for uncertainty, and that the forfeiture clause as a whole is not void on this ground it is unnecessary to go into their evidence to see whether some of it may have been relevant to the issue of uncertainty. This evidence was produced to establish that the event prescribed in the forfeiture clause which might determine the vested interest is uncertain within the rule laid down by the House of Lords in *Clavering v. Ellison* (1).

We were pressed with the opinion of Lord Cranworth where he said: "And I consider that, from the earliest "times one of the cardinal rules on the subject has "been this: that where a vested estate is to be defeated "by a condition on a contingency that is to happen "afterwards, that condition must be such that the "Court can see from the beginning, precisely and dis- "tinctly upon the happening of what event it was "that the preceding vested estate was to determine" (2). Lord Campbell L.C. states the rule from the point of view of the parties and not of the court. He says: "Even as conditions subsequent, to defeat vested "estates they must be construed strictly, and to work "a forfeiture there must be shown a breach of a "defined line of conduct which the parties concerned "must reasonably have known would work a for- "feiture" (3).

In *In re Sandbrook* (4) Parker J. accepts but qualifies the passage from Lord Cranworth's judgment and says: "Conditions subsequent, in order to defeat

(1) (1859) 7 H.L.C. 707.
(2) Ibid. 725.
(3) Ibid. 721.
(4) [1912] 2 Ch. 471, 477.

C.A. 1949.

McCausland and Others v. Young and Others.

Babington L.J.

"vested estates, or cause a forfeiture, must be such "that from the moment of their creation the Court can "say with reasonable certainty in what events the "forfeiture will occur." The test must be the same for the court as for the parties and the court has to be satisfied in this case that the parties concerned must reasonably have known what acts of theirs would amount to a breach of the defined line of conduct so as to work a forfeiture under clause 15.

As the parties concerned cannot be members of the Roman Catholic church when they elect to join it they must decide whether their action in becoming members of or professing the Roman Catholic religion will be a breach of the line of conduct prescribed for them by the clause, according to the accepted meaning of the words used, as reasonably understood by persons who are not Roman Catholics. Interpreted in this way I agree with the learned judge that there is no uncertainty as to the acts which will work a forfeiture though there may be a failure of proof as to whether or not these acts have taken place.

In the present case, however, the plaintiff, Connolly Robert McCausland, wrote to Mr. Ingram, one of the trustees, on the 27th September, 1940, saying: "I am "a Roman Catholic having been received into the "Church on May 3rd last at Ascot Priory, Berks.", so that the breach is here admitted, and assuming that he is bound by the clause his estate has been forfeited.

In *In re Evans* (1) Farwell J. held that the question whether a person has "become a convert to the Roman "Catholic religion" can be ascertained with certainty, but he appears to have had some doubt as to whether the fact that a person professes the Roman Catholic religion can be similarly ascertained. Viewing the matter as one depending on evidence I think the court is as competent to ascertain whether a person professes that he or she is of the Roman Catholic religion as to ascertain whether he or she has become a Roman Catholic, and to use Lord Cranworth's words, "can "see from the beginning precisely or distinctly upon "the happening of what event it was that the preceding

(1) [1940] Ch. 629.

" vested estate was to determine." But even if this be not so the two contingencies are disjunctive and the decision of the House of Lords in *Clayton v. Ramsden* (1) does not apply, so that if either event can be ascertained the forfeiture will operate.

Black J. has pointed out that the word " profess " has been used in connection with the Roman Catholic religion in many statutes. The Bill of Rights (1 W. & M. sess. 2, c. 2) enacts that every person who shall " *profess* the Popish Religion " shall be excluded from the Crown and this is re-enacted by section 2 of the Act of Settlement (12 & 13 W. 3, c. 2). The legislature must, therefore, have considered that the fact as to whether a person does or does not " profess the popish " religion " is an event capable of being understood with certainty and of being ascertained by evidence. The clause in this case appears to have been adopted from the precedent in Key and Elphinstone's " Con- " veyancing " and it is probable that the learned editors had regard to these statutory enactments when they drafted it.

It was further urged that this forfeiture clause is void as being against public policy. This was not advanced with any great confidence and is not borne out by the authorities cited.

These authorities have been fully considered by Black J and I will not deal with them again but be content to say that I agree in the conclusion he arrived at that this clause is not void as being contrary to public policy. If it were I cannot see how any condition subsequent which provides for forfeiture on the ground of a change of religion or adherence to any creed or sect or to any body professing ideas or principles, however objectionable in the opinion of the settlors, could be supported even though it be worded with the greatest precision and distinctness and the event which creates the forfeiture be clear and certain. Such provisions have, however, been severely criticised from time to time and in *Clayton v. Ramsden* (1) Lord Atkin said : " I view with disfavour the power of " testators to control from their grave the choice in

(1) [1943] A.C. 320, 325.

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

BABINGTON L.J.

"marriage of their beneficiaries, and should not be "dismayed if the power were to disappear," but he did not suggest that the condition then being considered was void on the grounds of public policy and no authority for this proposition was cited to us.

[The Lord Justice then examined the evidence relating to the circumstances in which the re-settlement was drafted and executed, and concluded that neither the father nor the family solicitor, Mr. Ingram, disclosed to the son the presence of the forfeiture clause; and that the son did not at any time before execution receive separate or, indeed, any advice on the matter. His Lordship then continued]:

The most charitable view of this fatality is that the father left all explanations to Mr. Ingram and Mr. Ingram assumed that they had been given by the father. Mr. Ingram knew that when Maurice M. McCausland went over to see his son in July, 1927, the forfeiture clause was not in draft and could not, therefore, have been explained to him by his father, at any rate in its final form, so that Mr. Ingram's duty to communicate it to the son was clear, more especially since the clause which disinherits the issue of any person in possession of the settled estates who becomes a Roman Catholic as well as the offending person, does not follow the original instructions, which only suggest that on the happening of the event the property should go over to the next in remainder who might be his issue, nor does it carry out the expressed wishes of Maurice M. McCausland who says in his letter of the 27th July, 1927, approving of the clause, that what he desired was that a Roman Catholic cannot succeed to the lands or to the trust money.

Moreover, it is apparent from Mr. Longfield's letter of the 26th July, 1927, returning the re-settlement, as approved by him, together with the draft clause, that he did not appreciate the fact that the clause as drawn by him, which he says is designed to prevent a person who may become a Roman Catholic from enjoying the settled property, operates to exclude not only such offending person but also his possibly unoffending issue. This shows that Maurice M. McCausland did not himself

realize how the clause would operate and that he probably executed the re-settlement under a misapprehension as to its effect. There may, therefore, have been mutual error, the father having executed a deed which would cut out the offending person's issue, which was not his intention, and the son having executed it without knowledge or advice as to its contents. Apart, however, from this consideration which by itself may be sufficient to render clause 15 invalid, the other facts bring the case within the decision of Lord Romilly in *Hoghton v. Hoghton* (1). The circumstances of the two cases are very similar in their general outline, except that in *Hoghton v. Hoghton* (1) the father obtained a benefit for himself in the re-settlement. Here Maurice M. McCausland obtained no direct benefit for himself, but he procured this forfeiture clause to be inserted in the re-settlement. This was his own wish, the instructions for it came from him and he approved of the clause, and it must be treated as a benefit to him requiring the same care to ensure that his son was consulted about it and advised either independently or by the family solicitor, as was required in *Hoghton v. Hoghton* (1). In the words of Lord Romilly: "In "addition also to its being a case of a re-settlement con- "taining some material provisions which are of an "unreasonable"—in this case *unusual*—"character, it "is, in my opinion, proved that the contents of it were "not properly made known to the son and that he was "left without the assistance and information which "are indispensable to enable this Court to sustain "such a transaction" (2).

In that case, as here, the property was disentailed prior to re-settlement. Father and son were then free agents and the re-settlement was read over to the son before he signed it, but Lord Romilly held that transactions between parent and child, prior to the complete emancipation of the latter, must be watched with great jealousy, and that the mere reading over of a deed is not sufficient to satisfy the court that the person hearing it read understood it. He says: "In "my opinion, unless it is accompanied with an

(1) (1852) 15 Beav. 278. (2) Ibid. 314.

C.A. 1949.

McCausland and Others v. Young and Others.

Babington L.J.

" explanation of the contents of a deed, the reading " over to an unprofessional person is more likely to " confuse than to enlighten him " (1).

In the present case the documents were sent to the London solicitors without any instructions beyond securing their due execution. The re-settlement was not read over to Connolly McCausland, but he was asked if he wanted to read it himself. He says he started to do so but could not make very much of it and eventually turned to the schedules to see how much money there was, and he signed it without seeing the forfeiture clause and in ignorance of the fact that it was in the deed.

A great number of authorities were cited to us but I do not find it necessary to go through them all. Independent advice is not always necessary in cases of family settlements and re-settlements but when one of the parties is a young man who has just come of age, the court will treat him as being still subject to the influence of his father whose fiduciary relationship imposes on him the obligation of showing that the son knew and understood the contents of the re-settlement and more especially of such provisions in the deed as are unusual and which the court would not sanction if it had to decide the matter. In *Turner v. Collins* (2) Lord Hatherley L.C. approved of the observations of Lord Romilly in *Hoghton v. Hoghton* (3), and Kekewich J. in *Hoblyn v. Hoblyn* (4) considered them again and came to the conclusion that they apply to re-settlements generally and not exclusively to those in which the father gains a benefit. In my opinion they apply to cases where some unusual clause is introduced into the settlement which has not got the sanction of long usage and which, therefore, requires explanation to ensure that it is the conscious and voluntary act of the son and not one of those well settled provisions which he may fairly be allowed to take on trust. In my experience solicitors are usually well acquainted with the steps which the law requires to be taken in such cases.

(1) Ibid. 311.
(2) (1871) L.R. 7 Ch. 329, 339.
(3) (1852) 15 Beav. 278.
(4) (1889) 41 Ch.D. 200.

It was well put by Kekewich J. in *Hoblyn v. Hoblyn* (1): "On what does this presumption in favour of the "propriety and reasonableness of a re-settlement rest? "Take the frequent case illustrated here of such a "settlement made by father tenant for life in possession "and son tenant in tail in remainder shortly after the "latter attains his majority. Does the Court presume "that the son has had independent advice or insist "that he ought to have had it? I think not. *Where "proper precautions are taken the position of the son as "tenant in tail is fully explained to him, as are also the "proposed limitations and burdens on property which "would otherwise in the ordinary course of nature become "absolutely his own.* And if this duty is often, and in "simple cases sufficiently, discharged by the father's "solicitor, it is sometimes with advantage handed "over to another solicitor called in for the particular "purpose, or, according to a commendable practice "familiar to me through an eminent conveyancer "referred to counsel instructed to advise the young "man independently. To omit all these precautions "is to incur risk."

The italics are mine. No precautions were taken in this case. The proposed limitation was not explained to the son or brought to his notice by the father's solicitor, and the warning signs given by counsel both before and after he had drawn the clause were disregarded.

And there can be no doubt as to what precautions should have been taken in this case. In *Tucker v. Bennet* (2), Lopes L.J. says: "A father living on "affectionate terms with his daughter is the proper "person to recommend and advise her, and her "natural agent in matters relating to the preparation "of her marriage settlement, and in my opinion there "is no occasion for any independent legal advice "beyond that of the family solicitor."

This is good sense as well as good law. If independent advice is not sought the family solicitor should in a case like the present satisfy himself that the father has recommended and advised the son, he

(1) (1889) 41 Ch.D. 200, 205. (2) (1887) 38 Ch.D. 1, 17.

C.A. 1949.

McCausland and Others v. Young and Others.

Babington L.J.

should form an independent judgment as to the propriety of such advice, and if he does not approve of it should give the son such other advice as he considers necessary, and he must see to it that the son knows his rights and understands what he is doing and finally he should keep a record of these matters to provide against such contingencies as those that have arisen in this case.

I think Mr. Ingram must have considered that the father was in a position to force this clause on his son because he was bringing in free property without realizing that this would have been equally fatal, for the decision to adopt the clause was one requiring the assent of both, irrespective of whether there was anything in the scales to balance it or not.

The Attorney-General said that it is to be assumed that the clause was discussed by Maurice M. McCausland with his son and that he therefore executed the re-settlement with full knowledge, but when the facts relating to the preparation of this clause and to its insertion in the re-settlement, together with the evidence of Connolly McCausland that when he executed the deed he was unaware that the clause was in it, placed the onus on the parties upholding the re-settlement to show that this was untrue and that he was fully informed and instructed prior to execution. The burden of proof was, therefore, on the parties trying to uphold the forfeiture clause, as Denman J. held it to be in *Lovesy v. Smith* (1), and they have failed to discharge it.

The Attorney-General further claimed that the long period of time which was allowed to elapse before clause 15 was definitely challenged had greatly prejudiced the trustees, since both Maurice M. McCausland and Mr. Ingram had died before action and their evidence was lost. Unless the delay can be relied on as a defence to the action under the circumstances of the case this complaint has no substance, nor can it be charged against Connolly McCausland as something unfair for which he is responsible because if he was informed about clause 15 by any one, a record of

(1) (1880) 15 Ch.D. 655.

the source and nature of such information should have been kept by Mr. Ingram for the protection of himself and his client Mr. Maurice M. McCausland, and no such record is forthcoming.

On all the foregoing evidence and arguments I am satisfied that the recital in the re-settlement to the effect that father and son had agreed to make the settlement therein contained is erroneous and untrue and that clause 15 was improperly inserted in the re-settlement. It follows that if it had been challenged before Connolly McCausland committed himself to the acts which are now relied on as acquiescence by him in the re-settlement and the consequent forfeiture it would have been struck out or the settlement would have been set aside, and I think it is necessary to point out in this connection that the case of *Turner v. Collins* (1) where it was held that a minor who had made a voluntary gift to his father must challenge it within a reasonable time after attaining full age belongs to a different line of authorities which have no application here.

The only difficulty which presented itself to me during the arguments on this branch of the case was whether Connolly McCausland, being of full age when he executed this re-settlement, should not be treated as knowing its contents, as Lord Macnaughten said in *Edwards v. Carter* (2). In that case a minor after coming of age repudiated a settlement executed by him on his marriage. This settlement contained a covenant to settle after-acquired property. He could have avoided it within a reasonable time after coming of age but did not do so until nearly five years later, which the House of Lords held was too late, the settlement being merely voidable and not void. But no question arose as to the clause being unusual or as to the matters in issue in *Hoghton v. Hoghton* (3) or in this case, it being assumed or admitted that the deed must stand unless it could be repudiated on the ground that the settlor was a minor when he executed it.

Edwards v. Carter (2) is an entirely different class of case from *Hoghton v. Hoghton* (3) and other cases like the

(1) (1871) L.R. 7 Ch. 329.
(2) [1893] A.C. 360, 367.
(3) (1852) 15 Beav. 278.

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

BABINGTON L.J.

present in which settlements have been executed by persons of full age and afterwards set aside or rectified on equitable grounds as Kay L.J. points out in *Carter v. Silber* (1).

Connolly McCausland having therefore substantiated his plea that clause 15 was introduced into the re-settlement of 1927 under such circumstances as not to be binding on him, the further questions then arise as to whether his subsequent acts are a confirmation of, or acquiescence in the settlement, or are of such a nature as to make it impossible for the court to grant him relief. These matters are in issue on the facts and it is upon the facts that they must primarily be determined.

[The Lord Justice then examined the evidence relating to the events between the execution of the re-settlement of 1927 and 1940, and concluded that though Connolly McCausland knew, or ought to have known, as a result of his interview with Lucius Thompson in 1939 that there was some provision in the re-settlement relating to change of religion, it was not until his interviews with Mr. Ingram on the 18th and 19th August, 1940, that he was for the first time acquainted with the full and precise terms and effect of the forfeiture clause. His Lordship continued]:

Black J. has held that Connolly McCausland, by his acts subsequent to the interview with Mr. Ingram on the 18th and 19th August, 1940, when he was informed of the provisions of the re-settlement, has acquiesced in the forfeiture of his estates. These acts must, therefore, be carefully scrutinised to see whether this conclusion is a just and proper one.

The principles governing acquiescence are not in doubt. In *Wright v. Vanderplank* (2) a daughter conferred a life estate in property belonging to her on her father which would have been set aside if she had not subsequently confirmed the gift by a post nuptial settlement. Turner L.J. says: "The question to be "determined is, whether there was a deliberate, un-"biassed intention on the part of the child to give to

(1) [1892] 2 Ch. 278. 288.

(2) (1856) 8 De G. M. & G. 133.

" the parent " (1), and again : " I am not of opinion " that a positive act is necessary to render the trans- " action unimpeachable. All that is required is proof " of a fixed, deliberate and unbiassed determination " that the act should not be impeached " (2). The case was treated in the head-note as one of acquiescence and it illustrated the final and irrevocable nature of the acts required by law to defeat prior legal rights, but when Turner L.J. refers to a " deliberate intention not " to impeach the gift " he is saying in effect that the daughter confirmed or acknowledged the gift and thereby set it up. This was not therefore a case of acquiescence but of confirmation and in *De Busche v. Alt* (3) Thesiger L.J. (3) says : " The term ' acqui- " ' escence ' . . . is one which was said by Lord " Cottenham in *Duke of Leeds v. Earl Amherst* (4) " ought not to be used ; in other words, it does not " accurately express any known legal defence " ; and he goes on to point out the difference between acquiescence which occurs while the act acquiesced in is in progress and acquiescence after it has been completed.

In the former case a person who stands by while another infringes his rights and thereby induces such other person to believe that he assents to the infringement cannot be heard to complain. This is no more than an instance of the law of estoppel by words or conduct and may reasonably be called acquiescence. " But," says Thesiger L.J., " when once the act is " completed without any knowledge or assent upon the " part of the person whose right is infringed "—which is the present case—" the matter is to be determined on " very different legal considerations. A right of action " has then vested in him which, at all events as a general " rule, cannot be divested without accord and satisfaction " or release under seal. Mere submission to the injury " for any time short of the period limited by statute " for the enforcement of the right of action cannot " take away such right, although under the name of " laches it may afford a ground for refusing relief under

(1) Ibid. 146.
(2) Ibid. 147.
(3) (1878) 8 Ch.D. 286, 314.
(4) (1846) 2 Ph. 117, 123.

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

BABINGTON L.J.

"some particular circumstances; and it is clear that "even an express promise by the person injured that he "would not take any legal proceedings to redress the "injury done to him could not by itself constitute a "bar to such proceedings, for the promise would be "without consideration, and therefore not binding"(1).

Having regard to the authorities the delay in this case is not, in my opinion, of such a duration and nature as to compel the court to refuse the relief sought. This delay is explained by the way in which the forfeiture was dealt with by all the parties interested, and the answer to Connolly McCausland's claim to avoid the forfeiture must be either that he has by his acts shown a "fixed deliberate and unbiassed determination" to abide by it, or that he has so dealt with the property as to make it impossible for the court to grant him relief. An intention to confirm the re-settlement or an intention to abandon the claim to impeach it must be proved. This is established by the authorities and is well settled. The reality of the act of confirmation or abandonment depends on the intention of the party against whom it is alleged, whether it be the confirmation of a substantive gift as in *Wright v. Vanderplank* (2) or the abandonment of a right of action as in this case, and when the facts are complicated and the inferences to be drawn from them are in doubt, the determination "must largely depend on the turn "of mind of those who have to decide and most there-"fore be subject to uncertainty": see Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.* (3). I, therefore, approach this issue of confirmation in an endeavour to ascertain from the facts whether Connolly McCausland has shown an intention to confirm the re-settlement or has estopped himself from challenging it.

Connolly McCausland obtained knowledge of the clause to which he had committed himself in August, 1940, but he could have had no knowledge of the circumstances under which it came to be in the re-settlement until he got discovery of the contemporaneous

(1) (1878) 8 Ch.D. 286, 314.
(2) (1856) 8 De G. M. & G. 133.
(3) (1878) 3 App. Cas. 1218, 1279.

documents. Messrs. Charles Russell wrote to Mr. Ingram for the original instructions and draft deed of re-settlement on the 30th January, 1941, and these were sent to them along with the entries in his firm's books and copies of all letters relating to clause 15 under cover of the letter of the 6th February, 1941; and on May 3rd, 1941, Mr. Ingram's firm wrote to Messrs. Charles Russell saying: "As we have not "heard further from you we presume that the con- "templated application for alteration of the re-settle- "ment has been abandoned and we shall therefore be "obliged if you will return the original documents."

There was some further correspondence and Mr. Ingram's firm wrote again on the 8th September, 1941, thanking Messrs. Russell for returning the documents and saying: "May we asume that Major McCausland "has decided not to institute the proceedings that he "was at one time contemplating." To which they replied that they did not think that Major McCausland had come to a final decision on the matter.

A parallel correspondence was proceeding at this time between Connolly McCausland and his brother-in-law, who says in a long letter of the 9th September, 1941: "So far as the settlement is concerned therefore "we conclude that there is no way between accepting "it and going to the court to have it set aside. If you "decide to go to the court Helen and I will do nothing "to defend the settlement beyond the minimum which "we are apparently compelled to do as guardian of "our children's interests under it." And later in the same letter: "I think we should get the main point "settled one way or the other as soon as may be. "Ingram says that if you do decide to go to the court "you should do it soon, otherwise you might prejudice "your case by apparent acquiescence. I do not know "how far that would apply to a serving officer but on "all counts an early settlement is desirable."

Connolly McCausland answered this on the 14th September, 1941, and after referring to his hopes of a family arrangement says: "But Drenagh is morally "mine and my children's after I am dead, no matter "what the law as it now stands may say to the contrary.

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

BABINGTON L.J.

"You agree with this I know and so we need not "discuss it. As to bringing a case I am not keen to "do so since I have taken the best legal opinion I "could get on the subject and this opinion is on the "whole against it. If I brought a case I might easily "lose it and have heavy costs to pay as well. It "'kills' me without issue, deprives Peggy of her "jointure and my children of their portions. The "same law prevents Helen from doing anything to "help though she wants to do so—the whole having "been conceived in a brain which has now no interest "in the affairs of men."

There was some further correspondence between the solicitors and between Connolly McCausland and his brother-in-law who was trying to force him to come to a decision whether to prosecute his claim in the courts or accept some settlement that the parties were trying to arrive at among themselves.

Finally, Connolly McCausland wrote to Mr. Ingram on the 18th November, 1941, as follows: "Dear Cousin "Alex., I am writing to tell you that I no longer feel "myself in a position to bring an action in the courts "against the re-settlement of 1927. I do wish, "however, to make it perfectly clear that by *accepting* "the settlement I hope to make things easier for you "and the other trustees and I do not wish to prejudice "any re-opening of the case by me or by my descendants "at some future or more favourable time. Yours "affectionately, Connolly McCausland."

Mr. Ingram accepted this so-called abandonment by a letter written to Connolly McCausland on the 25th November, 1941, saying: "I am glad you will not "proceed with the suggested application to the courts "for the alteration of the settlement which I always "felt sure could not be successful and would necessarily "have led to the expenditure of very large sums in "legal costs." Mr. Ingram wrote to his partner and co-trustee, Mr. Young, on the same day quoting Connolly McCausland's letter and saying: "It would "seem *sufficiently clear* from this that he has abandoned "the proceedings which he contemplated taking to "have the settlement amended and I should like to "know whether you agree in this view."

The war was then at its most critical stage. Connolly McCausland had been overseas in action in May, 1940, first in Holland and then in France, where he was awarded the Military Cross; and when his regiment came back from France they were preparing to resist invasion. He said that towards the end of 1941 he was very busy tank training and was very busily engaged with other things. It does not, therefore, require a great deal of imagination to realize that there must have been considerable foundation for the statement in his letter of the 14th September, 1941, to his brother-in-law; "The whole thing could not have "boiled up again at a worse time for me when I have "to concentrate with every atom of my will on the "intricacies of epicylic gears and the behaviour of "electrons under varying conditions. The whole thing "is like a bee buzzing to distract me or like midges in "the hair when one's hands are occupied. I condemn "it to the bottomist pit very frequently which is the "mentality of the weak minded and the slow witted." In my view of the evidence these were compelling considerations inducing him to write the letter of the 18th November, 1941, saying that he no longer felt himself in a position to bring an action and that the abandonment was largely dictated by his military commitments and was in his view temporary only, submitted to without any deliberate intention to give up his rights and the rights of his issue once and for all.

In this letter of 18th November, 1941, he "accepts" the settlement to make things easier for the trustees, but without prejudice to any reopening of the case by him or his descendants at some more favourable time.

This is not an irrevocable acceptance of the forfeiture clause or an abandonment of his right to impeach it. It is not a lawyer's letter and its terms are inconsistent, but Connolly McCausland denied, on cross-examination, that he had come to a final conclusion not to take proceedings, and I cannot read this letter in the light of all the other facts in the case as being a "fixed deliberate "and unbiassed determination" that the settlement should not be impeached.

Black J. says that after Mr. Ingram's reply it appears

C.A. 1949.

McCausland and Others v. Young and Others.

Babington L.J.

to have been assumed by all parties that after having been fully advised by his own solicitors and counsel as to his chance of success in proceedings to have the re-settlement set aside or rectified, Colonel McCausland had abandoned the idea of instituting such proceedings. I find myself in disagreement with this finding, as I believe that the true inference to be drawn from this letter, and from the subsequent correspondence between Connolly McCausland and Lucius Thompson, is that both of them looked on the matter as being open at least down to 8th April, 1944, when Lucius Thompson wrote the letter of that date dealing with a proposed application to the court to have the forfeiture clause cancelled and setting out the terms on which he thought this could be done.

This letter was written less than two months from the service of the writ and I cannot reconcile it with the trial judge's finding that all parties thought that Connolly McCausland had abandoned the idea of instituting proceedings, and I am satisfied that so far as the parties, other than the trustees, were concerned they all took the view that proceedings might be instituted.

Black J. seems to have attached some importance to the fact that Connolly McCausland did not answer Mr. Ingram's letter of the 25th November, 1941, in which he assumed that Connolly's letter of the 18th November was a final abandonment of his right of action, but I do not attach any importance to this having regard to the relationship between them—the failure of Mr. Ingram to follow up his doubts as to the meaning of the letter with Connolly himself and the general circumstances in which the latter was then placed, more especially his military commitments to which he refers in his letter to Lucius Thompson of the 14th September, 1941.

The letter of the 18th November was relied on as a clear abandonment, but Mr. Ingram was himself dubious as to its meaning and asked for his partner's views. It does not appear what reply he got from Mr. Young, if any, but it may well be asked why did he not express the doubts he communicated to his partner

and co-trustee in the letter of the 25th November, 1941, to Connolly McCausland himself and ask him to say definitely whether he was on or off. He still owed this young man a duty. As trustee of the settlement and as the solicitor in charge of the trust he should not have accepted this conditional abandonment as final and absolute, and his failure to clear the matter up with Connolly McCausland directly contributed to the subsequent difficulties.

He further conveyed his construction of this letter to Helen Thompson in a letter of the 1st December, 1941, in which he says : " I have heard from Connolly that " he will not proceed with his contemplated application " to the court for modification of the settlement of " 1927." This misrepresents the import of the letter which on its face is without prejudice and conditional, and Mr. Ingram's acceptance of it as a final and unconditional abandonment of Connolly McCausland's right is open to very grave exception, especially in the light of his letter to Mr. Young and the doubts therein expressed which are not repeated in this letter to Helen Thompson. He assumed that Connolly McCausland had closed the matter and left himself no loophole, but the loophole was there in the letter of the 18th November, 1941, and, though Mr. Ingram turned a blind eye towards it, the Thompsons, notwithstanding Mr. Ingram's letter of the 1st December, in my opinion fully understood that the abandonment was not final.

Connolly McCausland was cross-examined with reference to his letter of the 25th March, 1942, to Lucius Thompson, in which he wrote : " However I think it is " better for all concerned, you, us, the Lowdens and " Drenagh itself, if we do sell out and depart (in peace)" ; and he said : " I was still referring to a temporary " leaving of Drenagh. The paragraph would not " deceive anyone who knew what was in my mind and " my sister's and her husband's. It was subject " always to a case being brought. I intended to come " back if I possibly could." Lucius Thompson apparently appreciated this when he said : " It was always " clearly understood between us that my brother-in-

C.A. 1949.

McCausland and Others v. Young and Others.

Babington L.J.

"law was free to go to the courts if there were a change "in the law or a change in the government and also "that when the minors had ceased to be minors a new "situation would come into existence." What the brother-in-law understood is by no means clear beyond this, that the understanding expressed by Lucius Thompson was one which recognized that Connolly McCausland's failure to challenge the entry of the Thompsons under the forfeiture was not based on a fixed determination not to impeach the forfeiture clause, but that it was, as he said in his letter of the 18th November, 1941, without prejudice to his re-opening the case at some future and more favourable time. And the subsequent correspondence between the brothers-in-law dealing with the business aspect of handing over the demesne and settled property to the Thompsons recognizes this.

In a long letter of 22nd February, 1942, Lucius Thompson dealing with the sale of furniture in Drenagh says: "I would suggest agreeing on a price based on a "mean between the valuations for Probate and for "insurance subject to an understanding that we would "re-sell any or all to you at the same value in the event "of your becoming life tenant." As Connolly could only become life tenant if the forfeiture clause was successfully challenged, this recognises that the Thompson's entry was not necessarily final and that proceedings might be taken by Connolly to challenge clause 15.

Again in a letter of 13th March, 1942, Lucius Thompson says with reference to a farm at Drenagh: "It has occurred to me that a possible arrangement "would be that we should agree that *if the place should* "*revert to you* we would re-sell to you the stock and "implements at the same valuation as we paid or at "the market value, whichever was the less"; and again in the same letter he says: "I needn't set out "the reasons why we think a clear cut settlement best "since they all amount to this that barring an annul-"ment of the settlement (which my suggestion above "tries to provide for) Helen has no choice but to become "a life tenant"; and the "*depart in peace*" letter of

the 25th March, 1942, which was put to Connolly McCausland as an irrevocable decision by him never to challenge the settlement, appears to have had reference, as he said in evidence, to a suggestion in the letter of the 18th March that he should continue in Drenagh as a farming tenant. On this evidence I am satisfied that the letter of the 18th November, 1941, was based on the idea that in some way he could effect a settlement or compromise with his sister and her husband without reference to the courts

On the 12th February he wrote to Lucius Thompson saying : " I need not say that I have always hoped for " an amicable settlement of the whole of this tragic " business and that it would take the form of an " understanding or 'gentleman's' agreement " by which the property would be made over to Marcus at the next re-settlement in 1952. This suggestion was, of course, impracticable while the re-settlement stood and Lucius Thompson rejected it. Connolly wrote again on the 14th March, 1944, and suggested a friendly application to the courts to restore the status quo by striking the clause out of the re-settlement on terms that all parties would agree to.

In answer to this proposal Lucius wrote on the 8th April, 1944, and said : " I am wondering whether the " trustees will feel obliged to oppose a plea whether " joint or otherwise for the cancellation of the for- " feiture clause. If so I imagine it will be a thing that " you will want to take into consideration as we shall " too. I have asked Brown " (the solicitor then acting for the trustees, Mr. Ingram having died on 3rd May, 1943) " to let me know the trustees' attitude as soon " as he can. It may interest you to know the suggestion " I made to Brown though it cannot be considered as " any final or formal decision that I am communicating " to you. I suggested that *we should join you in an* " *appeal to have the R. C. forfeiture clause deleted as being* " *a proven cause of bitterness and strife.* If the court " agreed to that and you wished to proceed with a plea " that the deletion should be made retrospective Helen " would not join formally in the plea but would offer " no opposition to it provided that—

C.A. 1949.

McCausland and Others v. Young and Others.

Babington L.J.

" (*a*) If the court were to accept your plea—
" (i) no compensation should be paid to " Helen from any source ;
" (ii) no compensation should be paid to " the minors out of or be a charge on " the settled estate and investments ;
" (iii) a subscription of £10 per annum " should be paid to the general " parochial funds of Drumachose and " of £5 per annum to the general " parochial funds of Balteagh ;
" (iv) a title of undoubted soundness be " conferred on you and your heirs ;
" or (*b*) If the court were to refuse your plea and your " heirs and representatives *should regard the question* " *as finally settled.*"

This is a very strange correspondence if the Thompsons held the view that Connolly McCausland had irrevocably abandoned his intention to challenge clause 15 in 1941. Both parties treated the matter as being still open, and though Connolly McCausland's mind fluctuated from time to time and was not at any time clear, I cannot find any satisfactory evidence that he ever abandoned his rights. Indeed the evidence is all the other way and I am satisfied that he never acquiesced in the forfeiture, and that though often at his wits end to know what he should do he still held on to the life-line which alone could save him, namely, his right to appeal to the courts.

He was eventually driven to take this course and Messrs. Currie wrote to the trustees' solicitors on 30th May, 1944, while Connolly McCausland and his brother-in-law were discussing what they were going to do saying : " As you are aware Major McCausland " has been on active service since 1939 and had " determined to allow the matter to be shelved until a " more favourable time. It has recently been brought " home to him that if the forfeiture is held to have " operated against him, which of course he does not " admit, it may be necessary to go into evidence and " that his evidence would die with him in the event of " his being killed in action. For this reason it is

"essential that the action to determine his rights "should be launched at once."

Messrs. Martin King French & Ingram replied on the 5th June, 1944, saying that they would oppose any application to alter the terms of the re-settlement on the grounds that it would be contrary to the intention of the deed and that it prejudices persons whose interests the trustees consider they are bound to protect.

The writ was accordingly issued on the 19th June, 1944.

When considering this plea of acquiescence it is impossible to dismiss from one's mind the fact that the forfeiture clause must be held not to be binding on Connolly McCausland which, as I said earlier in this judgment, colours all the subsequent evidence for if acquiescence or non-acquiescence have to be judged upon the balance of justice or injustice, (see *Lindsay Petroleum Company v. Hurd* (1) adopted by Lawrence L.J. in *Weld v. Petre* (2)), I cannot help feeling that it would be unjust to bind Connolly McCausland to submit to the forfeiture upon the ground of acquiescence except on the very clearest evidence not only that he did acquiesce but also that he was in possession of the facts necessary to inform him of the strength or weakness of his claim to be relieved from it. This raises the question as to what knowledge Connolly McCausland had of his rights.

In *Life Association of Scotland v. Liddal* (3), Turner L.J. says: "Acquiescence, as I conceive, imports "knowledge, for I do not see how a man can be said "to have acquiesced in what he did not know, and in "cases of this sort I think that acquiescence imports "full knowledge, for I take the rule to be quite settled "that a *cestui que trust* cannot be bound by acquies-"cence unless he has been fully informed of his rights "and of all the material facts and circumstances of "the case."

Messrs. Charles Russell received certain documents

(1) (1874) L.R. 5 P.C. 221, 239.
(2) [1929] 1 Ch. 33, 52.
(3) (1861) 3 De G. F. & J. 58, 74.

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

BABINGTON L.J.

on his behalf early in 1941. What exactly these documents were is not in evidence and we do not know what information they had before them or upon what question their advice was taken. I am not satified that they were fully informed. If they had known or appreciated the discrepancy between the intentions of Maurice M. McCausland and the final form in which clause 15 emerged, I think they would have advised immediate proceedings, but this is mere speculation, and I do not attach the importance which Black J. appears to have done to the fact that Connolly McCausland consulted them before writing the letter of the 18th November, 1941.

This was put forward to show that he acquiesced with full knowledge of his rights, but I am satisfied that he never had such knowledge and that the forfeiture clause, which has now been held not to be binding on him, had a coercive effect on his mind which cannot be lost sight of when examining his acts and correspondence.

In my view, though he submitted under pressure to the surrender of his estate, he never adopted the forfeiture or confirmed it or expressed a fixed deliberate and unbiassed determination not to challenge it in the courts, and he was, in fact, in a somewhat similar position to the plaintiff in *De Busche v. Alt* (1), of whom Thesiger L.J. says that he grumblingly submitted to the transaction as something he could not help.

He was never a free agent. He was in the toils of this clause which had been forced on him, and this must be borne in mind when considering this issue of acquiescence. The onus of establishing Connolly's intention to abandon his rights was on the defendants, and as the war was in a critical stage in the autumn of 1941 and Connolly McCausland was on active service and had compelling reasons for getting rid of this dispute, temporarily at any rate, I do not think the court should draw inferences against him or spell out an intention on his part to abandon his claim to his estates and property unless it is compelled to do so by evidence which is conclusive.

(1) (1878) 8 Ch.D. 286.

Helen and Lucius Thompson were under no misapprehension as to his intentions. They were doing their best to assist him in getting rid of the forfeiture. They went into possession under directions from the trustees protesting that they did not want to do so. They consulted with him as to possible ways of escaping from the forfeiture and alternatively as to how the property might be managed as a joint concern or whether Connolly could be made a tenant of Drenagh, and when they took over possession the letters written by Lucius Thompson to Connolly McCausland on the 22nd February, 1942, and 13th March, 1942, show that even then they thought the matter might be re-opened, which is further borne out by the fact that neither they nor any other persons who take in remainder have appeared on this appeal to uphold the plea of acquiescence.

The Thompsons were in a very invidious and distasteful position and agreed to take over the property and estates with obvious reluctance. Neither side knew whether the settlement could be successfully challenged and until this was done the forfeiture had to be accepted.

After the trustees had put the forfeiture in operation in October, 1940, a number of acts were done which are pleaded in paragraphs 30 to 37 of the defence filed by the trustees as a confirmation and acceptance of the re-settlement, including the forfeiture clause.

The first, of course, is that Connolly McCausland gave up possession of his estates and property to his sister. This is obviously the most significant of the acts done by him and is alleged to be evidence of his intention not to challenge the forfeiture, but though he submitted to it the act was not his, for the forfeiture was put in operation by the trustees against his will and in spite of his protests. This yielding up of possession, however, is not such a bar as to raise a counter equity in favour of Helen Thompson, and it is not of itself evidence of an intention not to challenge the forfeiture clause under which his property was taken from him.

The next is that Mr. Ingram recovered £454 5*s*. 9*d*.

C.A. 1949.

McCausland and Others v. Young and Others.

Babington L.J.

succession duty on behalf of Connolly McCausland, being a refund due to him on the cesser of his life estates. This was, no doubt, in law a confirmation of the re-settlement and of the forfeiture clause but in equity it should, I think, be treated as conditional if the act on which it was based was itself conditional and as being consequential on that act and as capable of re-adjustment if it turns out that the surrender of the property cannot be supported.

Then Connolly McCausland agreed to transfer the stock, crops and farming implements in Drenagh to the Thompsons and conveyed to the trustees certain lands of which he was owner. It is only necessary to say with reference to this that Lucius Thompson's letters of the 22nd February, 1942, and 13th March, 1942, show that it was an arrangement which might only be a temporary one and liable to be reversed.

The trustees raised a sum of £6,000 by a mortgage of the settled estates for Eileen Mary McCausland, Connolly McCausland's sister, which became due to her as a result of the forfeiture and the succession of her sister Helen Thompson. Here again the act was the act of the trustees and not of Connolly McCausland and it should in equity be regarded as consequential only and subject to confirmation by him or to revision by the court if the basis on which the money was raised turns out to be erroneous.

Lastly, the Thompsons adopted the McCausland name and arms in 1942 and this was put forward as an act by Connolly McCausland confirming the re-settlement—but not only was this not his act but he actively dissented from it and said in a letter to Lucius Thompson that he found it "the only distasteful "action in the whole affair," possibly to challenge its appearance of finality.

In my opinion all these acts were consequential on the handing over of the property and estates and were understood to be so by the parties other than the trustees, and to be always subject to Connolly McCausland's right to re-open the question of forfeiture in the courts. Under other circumstances these acts might be regarded as corroborative of an intention

by Connolly McCausland to abandon his right to challenge the forfeiture or as being themselves evidence of such intention, but the evidence displaces this inference and establishes that when he "accepted" the re-settlement he did so conditionally and without prejudice, and that no one thought or assumed that he had done so irrevocably except the trustees, until at the earliest the spring of 1944, when the impossibility of reaching finality otherwise than through the courts became apparent to everyone.

If this issue of acquiescence is examined as one arising between Connolly McCausland and the trustees alone I cannot understand what equity the latter can have to insist that Connolly McCausland has acquiesced in the forfeiture of his estate. The right of action vested in him could not be divested at their suit without accord and satisfaction or release under seal and if the letter of the 18th November, 1941, be regarded as an express promise that he would not take any proceedings it was without consideration and not binding as Thesiger L.J. points out in *De Busche v. Alt* (1).

As between Connolly McCausland and his sister and brother-in-law on the other hand the equitable question remains. Has he within the decision of the Privy Council in *Lindsay Petroleum Co. v. Hurd* (2) placed them in a situation in which it would be unreasonable to place them if the remedy is to be asserted ?

The answer to this question is decisive, and in determining, on which side the balance of justice or injustice falls I am strongly influenced by the fact that this forfeiture clause was not his own disposition as in *Allcard v. Skinner* (3) and is not binding on him, and by the further consideration that those on whose behalf the plea of acquiescence is advanced objected to the forfeiture almost as strongly as Connolly McCausland himself and throughout the whole transaction were aiding and assisting him in his endeavours to escape from its results.

These parties have not appeared to substantiate

(1) (1878) 8 Ch.D. 286, 314.
(2) (1874) L.R. 5 P.C. 221.
(3) (1887) 36 Ch. D. 145.

C.A. 1949.

McCausland and Others v. Young and Others.

Babington L.J.

their equitable claim to hold Connolly McCausland to the forfeiture, and I am satisfied that by granting him the relief he claims this court will not be placing them in any unreasonable situation or in any situation which they have not already assented to in principle; and that the forfeiture clause being out of the way their minor son can have no interest in the settled estates except through the alleged estoppel with respect to which he can be in no stronger position than his parents.

The only question remaining arises in connection with these consequential acts and dealings with the settled property, namely, whether other people have so altered their position as a result of Connolly McCausland's action as to make it impossible to restore the parties to their original positions, and therefore inequitable for the court to grant the relief he asks. This is a question of estoppel properly so called.

On the correspondence and the evidence it cannot be maintained that Helen and Lucius Thompson-McCausland have been losers by what has happened or that their position has been altered to their detriment. On the contrary, they have received benefits, and unless their adoption of the name and arms of McCausland must be held to be a bar, there can be little difficulty in resorting them to the position they occupied prior to November, 1941. There is a long argument as to the change of name in a letter from Lucius Thompson-McCausland to Connolly McCausland justifying the change. He treats it as an open question and not as a provision with which they were bound to comply, and though the result of a decision in Connolly McCsualand's favour may be embarrassing to the Thompson-McCauslands, I do not feel that this is a matter that should be allowed to weigh very heavily in the balance against Connolly McCausland's right to challenge the forfeiture.

I therefore hold that none of the foregoing acts were final or conclusive and that they can be readjusted either by agreement between the parties or by the court. More difficult questions are dealt with satisfactorily almost every day in the Chancery Court; and Lucius Thompson-McCausland's letter of the 8th April,

1944, does not suggest that any insuperable barrier exists in the case.

The solution of this intricate and protracted argument, therefore, is that Connolly McCausland is not bound by the forfeiture clause in the re-settlement, that he did not at any time before action either confirm it or abandon his claim to challenge it or acknowledge it to be binding on him. He is, therefore, entitled to such relief as the court can grant him under the circumstances.

The Attorney-General maintained that even if Connolly McCausland has succeeded in establishing that the forfeiture clause is not binding on him and that he has not acquiesced in it, nevertheless this is not a case of mutual mistake and the court cannot, therefore, reform the instrument but must either allow it to stand or set it aside altogether. I will not deal with this argument at length. Black J. has rightly rejected it and I agree with him that the power of the court to rectify a settlement is not limited to cases where there has been mutual mistake.

As I have said, I am not sure that there was not mutual mistake in the present case, and though it is unnecessary to decide whether there was or not, but the way in which the final form of the forfeiture clause came about and its adoption by Maurice M. McCausland are facts which we are bound to have regard to when deciding whether rectification should be ordered.

This is an unusual clause. It was included in the re-settlement without the knowledge of Connolly McCausland, who was not advised independently or at all, and appears in a form which is not in conformity with the expressed wishes of his father so far as they can be gathered from the evidence. It stands completely alone, as was said in *Hoblyn v. Hoblyn* (1), and can be expunged without upsetting any of the other provisions of the deed.

But above all, the case is one which is coloured throughout by the fiduciary relationship which the father owed to his son and which the family solicitors should have made certain was adequately discharged,

(1) (1889) 41 Ch. D. 200, 213.

C.A. 1949.

McCAUSLAND AND OTHERS v. YOUNG AND OTHERS.

BABINGTON L.J.

and as this was not done the authorities cited by Black J. and especially the cases of *Bentley v. Mackay* (1), *Clark v. Girdwood* (2), *Lovesy v. Smith* (3) and *James v. Couchman* (4) show that a settlement can be rectified under the circumstances here established, even though there was no mutual mistake.

The conclusion at which I have arrived makes it unnecessary to consider whether, if Connolly McCausland were to be held bound by acquiescence or any form of estoppel, his son could challenge the forfeiture clause.

If a forfeiture clause in this form is included in a re-settlement with the knowledge and approval of a settlor it binds him and his issue. If such knowledge and approval is disputed by a settlor who subsequently acknowledges the re-settlement with the forfeiture clause in it or confirms it or does acts which estop him from challenging it, I have some difficulty in understanding how a volunteer taking under him can be in any better position. If it were so it would lead to endless confusion and uncertainty with no limit of time within which the claim must be made. No authority was cited for this proposition and I will only say that as at present advised, the deed must stand or fall by the acts of the settlors. If Connolly McCausland had bound himself by acquiescence this would have set up the deed with the forfeiture clause included and would have been binding on his issue, because being one of the settlors the alleged estoppel would operate through him as a confirmation of the settlement.

The case is one of very great importance and it is a calamity for the parties that this Court is not fully constituted.

They are thereby deprived of a clear decision and this is a result which I need hardly say the Court as constituted has tried to avoid. But for my own part having arrived at a conclusion satisfactory to myself I feel bound to express it though I do so with great

(1) (1862) 4 De G. F. & J. 279.
(2) (1877) 7 Ch. D. 9.
(3) (1880) 15 Ch. D. 655.
(4) (1885) 29 Ch. D. 212.

embarrassment, since my opinion differs from that of the trial judge and the Lord Chief Justice and this difference of finding makes the appeal abortive.

In my view the appeal of the trustees should be dismissed and Connolly McCausland's cross-appeal allowed, but as the judgment of Black J. must stand in the circumstances it is unnecessary for me to discuss the form of order which I think should be made.

The court being equally divided, the appeal and cross-appeal stood dismissed and the order appealed from affirmed.

Solicitors for the appellant: *Martin, King, French Ingram.*

Solicitors for the respondents Connolly Robert McCausland, Margaret Louisa McCausland and Marcus Edgcumbe McCausland: *John K. Currie & Son.*

Solicitor for the respondent Marcus Perronet Thompson-McCausland: *E. G. C. Brown.*

Solicitors for other respondents: *Eric Morrow.*

J.McC.

K.B.D (Matrimonial) 1949.

May 13; June 17.

GARDINER v. GARDINER (1).

Divorce—Condoned adultery—Revival by subsequent conduct inconsistent with matrimonial duties—Practice—Condonation and revival not pleaded—R.S.C. Order lxx, r. 4.

A husband's association with another woman in a manner inconsistent with the performance of his ordinary matrimonial duties towards his wife is a matrimonial offence which may revive condoned adultery.

Cooke v. Cooke [1948] N.I. 46 applied.

R.S.C. Order lxx, r. 4, criticised in that it does not require either an admission of condonation of adultery nor an allegation of revival to be pleaded in the petition.

PETITION for divorce by a wife against her husband on the ground of adultery. The petition was undefended.

The facts appear in the judgment of the Lord Chief Justice.

McQuitty for the petitioner.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J. : Two points arise for determination in this cause which is a wife's undefended petition for divorce on the ground of her husband's adultery. The first is one of law ; the second one of procedure.

The petitioner was married to the respondent on the 7th December, 1926. There were two children, issue of the said marriage, born in the years 1927 and 1930, respectively. The success of the marriage, which appears to have been happy at first, was somewhat disturbed a few years later by the respondent's attachment to a girl whom he took out to dances. There is, however, no evidence that misconduct ever took place between them ; and, ultimately, the petitioner forgave her husband. Some years afterwards a Miss Madge Wells became a friend of both the petitioner and respondent, and she remained such

(1) In the King's Bench Division (Matrimonial) before Andrews L.C.J.

until the petitioner became aware of the true relationship which existed between her husband and Miss Wells. Ultimately she accused them of adultery, and they both admitted it. On the 2nd January, 1939, a child was born to Miss Wells, of which she alleged the respondent was the father. It died some three months later. The respondent denied the parentage; and, as the petitioner said in her evidence, "After this my husband and I made things up." This Miss Wells, who was subsequently married, is now the woman named in this cause, Madge Craig.

The petitioner and respondent continued to live together as husband and wife until March, 1943, when the respondent was sent by the Labour Exchange to work in England. He came home twice for holidays. On one of these occasions—October, 1944—the petitioner found a letter addressed to her husband. She showed it to him. We know nothing of its contents save such as might be inferred from the fact that, when challenged with it, the respondent burnt it, stating that the writer—a Miss Gladys Southan—was only a dancing partner. The petitioner naturally protested; and she both wired and wrote to Miss Southan, her husband afterwards requesting her not to do so any more.

The respondent returned to England. Sometime later the petitioner went over to see him at the place where he was working in Birmingham. He said that he did not want a divorce; that he had got into trouble, and could not get out of it, and to wait for a couple of months. Later still the petitioner received a letter from her husband to the effect that he was coming over to Belfast, bringing Miss Southan with him. This he did in October, 1945. He told the petitioner that he loved Miss Southan, who was wearing an engagement ring. Miss Southan said in his presence that they were to have been married in October, 1944, but that they had not been because of the petitioner's wire. The respondent and Miss Southan returned to England together in the same boat. Before leaving he offered the petitioner £500 if she would give him his freedom; to which the

K.B.D. (Matrimonial) 1949.

GARDINER v. GARDINER.

ANDREWS L.C.J.

petitioner replied that she would not do it for £1,000. The petitioner never saw or heard from her husband since that date.

I regard the petitioner as a truth-telling witness; and her evidence, as above stated, is, I believe, substantially correct. To a certain extent it is corroborated by the evidence of the petitioner's sister, Elizabeth McGrath; and both she and the petitioner's daughter, Dorothy Gardiner (especially the latter) gave evidence of visits in 1946 to Birmingham, where both the respondent and Miss Southan were residing. The precise conditions in which they were living is not very clear. Suffice it to say that the petition contains no allegation of adultery against the respondent with Miss Southan, though the circumstances deposed to are fully consistent with its commission. Doubtless it was felt that the evidence available was not sufficient to discharge the heavy onus of proof referred to in *Churchman v. Churchman* (1) and *Ginesi v. Ginesi* (2). The evidence given before me does, however, satisfy me as to their close and intimate association; Miss Southan's continued wearing of the engagement ring; their talking about getting married, and of their going to live together as man and wife in July, 1946, "if a "divorce were not through" by that time. Their wedding clothes were spoken of, and some were actually produced. Miss Gardiner summed up the situation, as she saw it, by saying they went about to dances and elsewhere together, and were just like an engaged couple.

Such is the evidence. It satisfies me as to (1) the respondent's adultery with Miss Madge Wells (as she then was) in 1938; (2) the petitioner's forgiveness and complete condonation of the offence over a period of several years; and (3) the respondent's subsequent association with Miss Southan in a manner wholly inconsistent with the continuance of normal marital relations with, or the performance of the ordinary duties of a husband towards his wife. Perhaps I should mention at this stage that the petition in this matter was filed as long ago as the 18th January, 1946,

(1) [1945] P. 44. (2) [1948] P. 179.

when it was impossible to rely upon desertion as a substantive ground of relief, as the statutory period of three years had not then elapsed.

I do not propose to deal at length with the legal issues arising from the petitioner's condonation of the respondent's adultery in 1938, and of the possibilities of its subsequent revival, as the relevant authorities have been recently reviewed by the English Court of Appeal in *Beard v. Beard* (1) and in *Kafton v. Kafton* (2). I would wish, however, to refer to what I may describe as the classic judgment of Scott L.J. in the former case. I may say that I also dealt briefly with the law in such matters in *Cooke v. Cooke* (3), in which I held that a wife's adultery, condoned by her husband, was revived by her subsequent desertion for the limited period of six months. At page 48 of the report I summarized the law as I understood, and as I still understand, it, as follows: "Condonation "is not absolute but only conditional in character. It "is a forgiveness which is subject to the implied "condition that there will be no repetition of the "matrimonial offence, or commission of any un- "warranted and substantial breach of matrimonial "duty. It is only so long as this state exists that "the bar of condonation continues. If there be a "breach of such condition the right to a remedy for "the condoned offence revives, and so enables the "court to base a decree of divorce upon it." After stating that it is not necessary that the new offence, or breach of matrimonial duty, should be of the same character as the former which was condoned, I added: "Neither is it necessary that the new matrimonial "wrongdoing should be of the same strength or degree "as the old, nor is it requisite that it should be of the "same gravity as the law would require as the "foundation for a decree."

In his exhaustive review of the cases in *Beard v. Beard* (1) Scott L.J. considers the meaning of "a "matrimonial wrong," insufficient of itself to entitle the injured spouse to a decree of divorce, but which,

(1) [1946] P. 8.
(2) [1948] 1 All E.R. 435.
(3) [1948] N.I. 46.

K.B.D. (Matrimonial) 1949.

GARDINER v. GARDINER.

ANDREWS L.C.J.

nevertheless, suffices to remove the bar effected by a previous condonation, and so to revive the original right of the injured spouse to a decree by reason of the former wrong. Perhaps, a brief summary here of judicial and other dicta on the subject would be convenient. Sir John Nicholl in *Durant v. Durant* (1), after asking the question (amongst others) as to whether any offence, short of subsequent adultery, namely an approach to adultery, would set aside condonation as a bar, ruled that condonation is forgiveness with an implied condition that the injury shall not be repeated, and that the other party shall in every respect be "treated with conjugal kindness." In *Evans v. Evans* (2)—a cruelty case—Dr. Lushington held that it was not necessary that it should be as strong as the original cruelty. In *Bostock v. Bostock* (3) Sir Cresswell Cresswell expressed the opinion that where there have been acts of violence followed by condonation, threats subsequently uttered, if of such a nature and so expressed as to satisfy the court that further cohabitation would be attended with danger to the party threatened constitute a sufficient ground for a decree of judicial separation. In *Winscom v. Winscom and Plowden* (4) intimacy falling short of adultery was regarded as sufficient to revive antecedent condoned adultery. In *Newsome v. Newsome* (5) Lord Penzance said that forgiveness of the condoned offence is "coupled with the condition that "the husband shall not in future be guilty of any "marital offence." In *Ridgway v. Ridgway* (6) Sir James Hannen P. held that improper conduct, not amounting to adultery, was sufficient to revive adultery and cruelty; and in *Blandford v. Blandford* (7) the same learned judge expressed the view that the legal definition of condonation was forgiveness upon the condition that the offending party should "sin no "more." Sir Francis Jeune P. in *Houghton v.*

(1) (1825) 1 Hag. Ecc. 733.
(2) (1843) 2 Notes of Cases 476.
(3) (1858) 1 Sw. & Tr. 221, 224.
(4) (1864) 3 Sw. & Tr. 380.
(5) (1871) L.R. 2 P. & D. 306, 311.
(6) (1881) 29 W.R. 612.
(7) (1883) 8 P.D. 19.

Houghton (1) said: "When the law speaks of con- "donation and revival, it means that the offence is "condoned on the condition that there shall be in the "future a proper compliance with the matrimonial "decencies and duties."

After referring to these and other authorities Scott L.J. in *Beard v. Beard* (2) said that the trend of judicial decision from 1730 onwards had been to uphold the rule that the bar of condonation continues only so long as the matrimonial conduct of the repentant spouse continues to be such as the Divorce Court can accept as "consistent with matrimonial duty." And again, after referring to the real principle underlying the cases that there must be no substantial digression from the path to which their marriage vows have bound the parties, he adds in a passage which I adopted as my own in *Cooke v. Cooke* (3) that "a matrimonial "or marital offence within the cognizance of the "Divorce Court" simply means "conduct which in "the eye of that court is wrong, whether it does or "does not reach the duration, or gravity, or com- "pleteness which is necessary to permit of a decree, "provided always that it be sufficiently serious for the "court to regard it as a substantial breach of duty."

The case of *Beard v. Beard* (4) was followed and applied by the Court of Appeal in *Kafton v. Kafton* (5), in which condoned cruelty was held to be revived as a matrimonial offence by subsequent desertion of less than three years. It does not appear, however, to me to put the law any further than was established in this court in *Cooke v. Cooke* (6). I shall only add that in all these cases of "revival" the matrimonial offence or misconduct must be of sufficient reality for the court to take cognizance of it, and not merely of such a minor degree, or of such a nominal character that it ought to be ignored.

The application to the present case of the principles referred to, in whichever judicial phraseology they be expressed, leads me to the irresistible conclusion that

(1) [1903] P. 150, 152.
(2) [1946] P. 8, 22
(3) [1948] N.I. 46, 49.
(4) [1946] P. 8.
(5) [1948] 1 All E.R. 435.
(6) [1948] N.I. 46.

K.B.D. (Matrimonial) 1949.

GARDINER v. GARDINER

ANDREWS, L.C.J.

the conduct of the respondent in the present case in deserting his wife and in associating himself as he has done with Miss Southan, amounts to a matrimonial offence or, rather, to a series of matrimonial offences of a character and degree which not only permit but compel the conclusion that the adultery with Miss Madge Wells has in law been revived, and can be relied upon as foundation for the decree of divorce sought in these proceedings.

It only remains for me to say a few words in regard to procedure in cases of this nature, in which condonation of the matrimonial offence sought to be relied upon is admitted, but in which it is proposed to rely upon other and subsequent facts which it is claimed amount to a revival of such condoned offence. I regard it as a fundamental proposition that the object of all good pleading is to set forth and to define with adequate clearness the issues which the court is called upon to determine. This is necessary, not only for the guidance fo the court, but, perhaps, still more, to prevent either party being taken by surprise at the trial. In the present case, in which no appearance was entered and no answer was filed, the petition, as drafted, effectually and completely conceals the only issues of difficulty which the court has been called upon to determine. Condonation is not admitted in the petition ; neither is revival alleged. Unfortunately, I am unable to hold, as our Rules stand, that this involves any breach of rule. The relevant provision is rule 4 (2) (*a*) of our Matrimonial Causes Rules, 1939, by which it is necessary for the petitioner, in the case of every petition for divorce on the ground of adultery, to file an *affidavit* stating (*inter alia*) whether the petitioner has in any manner condoned the adultery. This rule follows in terms rule 6 (2) (*a*) of the English Matrimonial Causes Rules, 1937. Wiser considerations, however, now prevail in England, where it has been found that reference by a petitioner to condonation in an affidavit (which, incidentally, I should state, is not served on the respondent) instead of in the petition, is unsatisfactory ; and the English Rules of 1947 amend the procedure accordingly : (see rule 4 (1) (*j*), and Precedent

of Petition, Rayden p. 774, par. 12). The change in the English rule is obviously designed to bring all the issues to the knowledge of the respondent and the court, and to place them in the appropriate part of the record, namely, the pleadings. In my opinion it is eminently desirable that our rules and procedure in this respect should be brought into harmony with those now prevailing in England at an early date.

I have one further observation to make in regard to the affidavit, filed on the 18th January, 1946, by the petitioner in the present case. In this affidavit the petitioner swore that she had not in any manner . . . condoned the adultery alleged in the petition. This statement is false, and is in direct conflict with the case which she presented before me, and which I accept. The adultery *was* condoned, but it was subsequently revived. I shall look for and expect greater accuracy in such matters in the future.

I grant a decree nisi on the ground of adultery, with the usual order as to costs against the respondent.

Decree nisi.

Solicitors for the petitioner: *N. & F. Tughan and Walmsley.*

M.V.P.

C.A.
1949.

April 27;
May 7;
June 14.

SPROULE v. BOGLE AND WILLIAMSON (1).

Negligence—Contributory negligence—Questions submitted to jury—Inconsistent answers—Answer contrary to evidence—"Last "opportunity" rule.

S., when standing in a trailer attached to a vehicle driven by W., the servant of B., was thrown out and injured when the vehicle was driven into an obstacle. In an action for damages for injuries caused by the negligence of W., it was pleaded that the plaintiff was guilty of contributory negligence in that he was standing instead of sitting in the moving trailer. The jury answered questions submitted by the trial judge as follows:—

"(1) Was W. guilty of negligence causing the accident?—*Yes.*"

"(3) Was the plaintiff guilty of contributory negligence?—*Yes.*"

"(4) If the plaintiff was guilty of contributory negligence, yet would W. by the exercise of care and skill have avoided the accident?—*No.*"

"(5) Damages (if any)—£350 (*Three hundred and fifty pounds sterling*)."

"We find for—*plaintiff.*"

Held, by the Court of Appeal (Andrews L.C.J. and Black L.J.), that where the driver of a vehicle becomes aware that a passenger has taken up a precarious position on the vehicle he is under a duty to exercise such additional degree of care as is called for by the passenger's risky position and is appropriate to the occasion; that the only conclusion which could properly be drawn from the evidence was that the fourth question to the jury should have been answered in the affirmative; and, accordingly, that the judgment entered for the defendant must be set aside.

Held, also, by Andrews L.C.J., that the jury's negative answer to the fourth question was so inconsistent with the fact that they had assessed damages and had included an express finding for the plaintiff, that the court was entitled to set the answer aside on the ground that the jury had manifestly failed to understand the question.

Per Andrews L.C.J.: The "last opportunity" rule has not been wholly abrogated, and it may still be relied upon as a helpful test in determining the issue of liability. The four questions for a jury in a contributory negligence case referred to in *Campbell v. Kelly* [1945] N. I. 70 should continue to be put in all cases in which there is evidence to support them and which fall to be determined under the law which existed before the passing of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1947.

(1) In the Court of Appeal before Andrews L.C.J. and Black L.J.

C.A. 1949.

SPROULE v. BOGLE AND WILLIAMSON.

APPEAL against judgment entered for the defendants in an action tried in the King's Bench Division before Porter L.J. and a common jury.

The facts of the case are sufficiently stated in the judgment of Andrews L.C.J.

Jones K.C. and *Agnew* for the appellant.
McSparran K.C. and *Moody* for the respondents.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J. : The plaintiff in this case, Samuel Sproule, appeals to this court for an order that the verdict given and the judgment directed and entered in the trial of this action for the defendants by Porter L.J. and a common jury on the 31st January, 1949, may be set aside, and that judgment be entered for the plaintiff for the sum of £350, being the sum at which damages were assessed by the jury, or, alternatively, for a new trial of the action.

The notice of motion set out various grounds on which the appellant relied, the two main submissions being (1) that there was no evidence, or, alternatively, no sufficient evidence of the plaintiff's contributory negligence ; and (2) that there was no evidence, or, alternatively, no sufficient evidence in support of the negative answer to the fourth question submitted to the jury, namely, " If the plaintiff was guilty of con- " tributory negligence, yet *would* (sic) the defendant, " Richard Williamson, by the exercise of reasonable " care and skill have avoided the accident." It was also contended that the jury did not understand the questions, or the effect of their answers ; that the verdict amounted to a miscarriage ; and that the trial was unsatisfactory.

The plaintiff is a blacksmith who lives near Castlederg. The defendant, Bogle, is the owner of a tractor and trailer, which is driven for him by the defendant, Williamson. On the 21st July, 1948, the plaintiff engaged Bogle to draw some timber for him from the saw-mill at Baronscourt—some eight miles away. There is some controversy as to the terms upon which

C.A. 1949.

SPROULE v. BOGLE AND WILLIAMSON.

ANDREWS L.C.J.

he was hired—whether as a voluntary neighbourly obligement or for reward. This appears to me, however, to be quite immaterial ; the action is purely one of tort—for damages for negligence. Later on the same day Williamson came with the tractor and trailer to the plaintiff's forge, which was on the way to the saw-mill. The plaintiff says that Williamson told him to get into the trailer, which he did. They started on their journey. A short distance from the forge they stopped to pick up the plaintiff's son-in-law, Speers, and the plaintiff's son, Charles, to assist in loading the slabs of timber in the trailer. Williamson, it is alleged, asked Charles Sproule to get on the mud-guard of the tractor to show him the way over. Speers got into the trailer with the plaintiff. There was really no other accommodation for any of them. Where they would have stood or sat on the return journey with the timber it is difficult to say. The journey was resumed over what proved to be a very rough road. All went well, however, until the saw-mill yard was reached. The plaintiff and Speers say that sometimes they sat in the springless, seatless, uncomfortable trailer, and that sometimes they stood in it holding on to the front. It is not admitted by Williamson that they ever stood up in the trailer whilst it was on the public road ; but of course from his position, driving the tractor in front of the trailer, he could not have had the trailer under anything more than, at the most, occasional observation. The tractor turned into the saw-mill yard which was approached by a short private road. There was timber piled in the middle of the yard, and also up against the side of the mill extending some distance out. It is admitted that Williamson drove on the right hand side of the centre pile. He was then facing the saw-mill. The plaintiff's case was that, turning apparently somewhat to the right, Williamson hit the pile of timber at the saw-mill with the left front wheel of the tractor. Williamson, on the other hand, says that, having at first gone to the right, apparently whilst passing the central pile, he then turned left ; and that, as he was about to stop, his right hand wheel touched a sharp

end of a slab of timber. This is a serious conflict of testimony, but once again the issue is not vital. The important admitted fact is that the tractor struck a piece of timber in such a manner and with such a degree of violence that both the plaintiff and Speers, who at the time were standing up in the trailer, holding on, as they say, to its twenty-five inch high front, were thrown headlong forward out of the trailer, and the plaintiff sustained serious injuries.

Williamson, who had admitted in his direct examination that he "struck" the slab of timber, endeavoured to make light of this on cross-examination, asserting that he "did not hit the pile of wood"; that the rubber tyre only "grazed up alongside it"; that there was "no impact at all"; that he "couldn't "say what broke the steering rod"; and that "there "was no collision at all." It would be a charitable view were I merely to say of this evidence that it was quite unconvincing.

Two points call for further consideration at this stage: (1) the speed at which, and the manner in which, the tractor was being driven by Williamson prior to the actual impact with the slab of timber; and (2) the time when the plaintiff and Speers assumed the standing position in the trailer prior to the accident; and when, if at all, Williamson became aware of their action.

As to the first of these issues all the evidence for the plaintiff was to the effect that the tractor was being driven at a somewhat rapid speed down the private road and through the saw-mill yard, the plaintiff, indeed, himself stating that, even when the slab of timber was hit, the tractor "was going as hard as it "had been going on the road as far as he could judge." Williamson, on the other hand, swore that he changed down his gears when going into the yard; that he had also applied his brakes; and that he was only proceeding at a good walking pace. I doubt if this evidence of the plaintiff and of Williamson was in their own respective interests; as the more rapid the speed, or the more reckless the manner of driving the tractor, the less justification there was for the plaintiff to adopt a standing position.

C.A. 1949.

SPROULE v. BOGLE AND WILLIAMSON.

ANDREWS L.C.J.

I turn now to the second point—when did the plaintiff and Speers stand up, and when did Williamson become aware of it. We are not really concerned with what happened on the public road, as to which there is ample justification for the view that, even if they did stand up at intervals, Williamson may not have known of it; for, in answer to questions put by the jury, he said that he could not say if they were sitting the whole way, as he did not look round at any time during the journey. Speers says that they were standing for three-quarters of a mile before they reached the mill; and, however this may be, there can be no doubt that they were standing up after the tractor had turned from the public road into the saw-mill yard. Here Williamson's evidence is of vital importance. On his direct examination he said: "When going into the yard I was changing down. "As I cut off the engine I could hear the rattle of their "boots, as if they were getting to their feet. I didn't "look round." Later, but still in his direct evidence, he added: "I heard the shuffle of feet as if Sproule "and Speers were getting up. Up to the time I heard "the shuffle I thought they were sitting." The witness became even a little more definite in cross-examination: "I changed gear," he said, "when I got to the yard— "was going at a good walking pace in the yard. As I "changed down I heard the noise in the trailer. They "stood up when I was going at a walking pace . . . "I thought it was unsafe for them to stand up. I only "heard the scramble of their feet. I did not tell "them to sit down because they were older than I." Finally, he added that "Sproule and Speers must have "been expecting me to stop—that is why they fell off." There is no room left for doubt on this evidence that Williamson, whilst still driving at what he describes as a walking pace through the yard, knew that these two men were standing up in the trailer, just as he also knew that Charles Sproule was seated in a position of peril on the mudguard of the tractor, from which he would have been thrown by the impact which occurred had he not seized hold of Williamson's overcoat with both his hands.

It was in these circumstances and with this knowledge that he drove the tractor in such a manner that it collided with a slab of timber; and both the plaintiff and Speers by the force of the impact were thrown out of the trailer, with the consequent serious injuries to the plaintiff.

Such was the material evidence upon which the learned Judge submitted certain questions to the jury, which, with their answers, were as follows:—

"1. Was the defendant, Richard Williamson, "guilty of negligence causing the accident?

"Answer: Yes.

"2. Was the defendant, Richard Williamson, "in the management of the tractor at the time of the "accident, the servant or agent of the defendant, "Bogle?

"Answer: Yes.

"3. Was the plaintiff guilty of contributory "negligence?

"Answer: Yes.

"4. If the plaintiff was guilty of contributory "negligence, yet would the defendant, Richard "Williamson, by the exercise of reasonable care and "skill have avoided the accident?

"Answer: No.

"5. Damages (if any)?

"Answer: £350 (Three hundred and fifty pounds "sterling).

"We find for—the plaintiff."

In my opinion these questions were quite adequate and proper to try the case. I dealt with the matter of the appropriate questions to be submitted to juries in these negligence cases so recently and so fully in *Campbell v. Kelly* (1) that I shall not repeat what I there stated. I have nothing which I now wish to amend or to retract. I did not say then, and I do not say now, that the four questions there referred to must be put to a jury in every case. No question need or, indeed, should be put unless there is proper evidence to support it. That clearly appears in my reference to the fourth question, namely, the question as to the

(1) [1945] N.I. 70.

C.A. 1949.

SPROULE v. DOGLE AND WILLIAMSON.

ANDREWS L.C.J.

plaintiff's avoidance of the consequences of the defendant's negligence, on pages 75 and 76 of the report. The present case affords an excellent illustration of what I there stated. When Williamson was guilty of the act of negligence which was the real, effective and proximate cause of the accident—the negligence, as it was called by Viscount Hailsham in *Swadling v. Cooper* (1) which "caused the injury"—there was absolutely nothing which the plaintiff could have done which would have avoided the accident. This was recognised by the learned judge, and also by the defendant's counsel who refrained from asking the judge to submit any question to the jury as to the plaintiff's avoidance of the defendant's negligence; and by their attitude, and the course of the trial consequent thereon, they must abide. It is only fair to Mr. Moody, who argued the case admirably for the defendant, that, whilst maintaining that the plaintiff should not have been standing in the trailer, he expressly conceded that nothing could have been done by the plaintiff to avoid the impact.

I have dealt with this matter first in order, as it were, to clear the air, and as far as possible to narrow the issues. I turn now to the questions which were properly submitted to the jury and to their answers thereon. The first is the issue of the defendant Williamson's negligence which was found against the defendants. There is no cross-notice served by the defendants to set aside this finding. Even if there were, such application could not be sustained, as there is ample evidence to support the finding. There was evidence as regards the speed of the tractor, the manner in which it was driven, and the course taken in this confined timber-strewn area which amply justified the jury, if they believed it, in holding the defendant Williamson negligent. Mr. McSparran, who also appeared for the defendants, at a very early stage of the argument disclaimed any intention of challenging this finding of the jury.

So also in my opinion the jury's finding of contributory negligence was fully justified and should not

(1) [1931] A.C. 1.

be disturbed. This does not mean that I should necessarily have arrived at the same conclusion. I might well have acted on the principle upon which *Anderson v. Belfast Corporation* (1) was decided—a case in which a passenger, who was standing on the platform of a slowly moving tramcar approaching a " Request Stop " at which he intended to dismount, was thrown off the car by a sudden acceleration and consequent shock. This court held the plaintiff entitled to succeed on the ground that such a passenger, as Babington L.J. put it at p. 37, only takes " the risk of the ordinary and " predictable acts of those in charge . . . including " such jolts as are usual and to be expected " ; or, as Murphy L.J. expressed it at p. 41, that such a passenger must accept " the risks ordinarily incident to travel." The jury might well have held in the present case that the collision with this slab of timber was, like driving a motor car into a roadside ditch, not an ordinary and predictable risk, or one ordinarily incident to travel ; that his position and that of Speers was sufficiently secure for all such risks and occasions ; and, accordingly, they might have acquitted him of contributory negligence. They were not, however, bound to do so ; it was essentially a jury question in which they found against the plaintiff ; and, notwithstanding Mr. Jones's able argument to the contrary, I am clearly of opinion that the finding cannot be disturbed.

This brings me to the last, and, in my opinion, the most difficult point in the case—the jury's negative answer to the fourth question which was submitted to them. It was strenuously argued before us that the jury did not understand the question, their answer, or its effect, and that the finding was not justified by the evidence. When the argument of failure to understand the question comes to be examined it is to be noted that by an unfortunate, undetected and accidental typist's error the word " would " was substituted in the question for the word " could." This may have helped to create some degree of mental confusion amongst the jury. There are, in my opinion, two further evidences in their findings that they did not

(1) [1943] N.I. 34.

C.A. 1949.

SPROULE v. BOGLE AND WILLIAMSON.

ANDREWS L.C.J.

mean what they in fact said in their answer to that question. The first is that when in the next question they were asked to assess "Damages (if any)"—words which would naturally convey that they were only to assess damages if the plaintiff was, in their opinion, entitled to them—they found very definitely the sum of £350, which they expressed not only in figures but also in words. It may be said that this is not *necessarily* an indication that the jury thought that the plaintiff was entitled to succeed, and that they intended only to make a provisional assessment; but such a view is, in my opinion, completely answered by their adding the word "plaintiff" to the printed words "We find for the . . ." which immediately precede the signature of the foreman in the issue paper. Whilst the negative answer to question 4 is allowed to remain the findings of the jury are at best self-contradictory.

I must pass on, however, from the issue paper to a consideration of the relevant facts which I have already mentioned. It appears to me that they would fully justify the view, which probably the jury held, that, whilst the plaintiff was negligent in standing up in the trailer when in motion travelling through the saw-mill yard, yet there was also negligence on the part of the driver, Williamson, who, with knowledge of the plaintiff's negligence, which I hold to be clearly established on his own evidence, drove the tractor at a speed, or in such a manner and direction, as to amount to negligence on his part. The existence of such knowledge on Williamson's part is, of course, a most material and vital factor; for, as in *Davies v. Mann* (1), the negligence of the plaintiff may thereby cease to be an operating factor in the collision: (see the judgment of Evershed L.J. in *Davies v. Swan Motor Co. (Swansea) Ltd.* (2).) It behoved the defendant with such knowledge of the plaintiff's position in the trailer to exercise such additional degree of care in the driving of the tractor as was appropriate to the occasion and thereby avoid the accident. He completely failed to do so. He so

(1) (1842) 10 M. & W. 546. (2) [1949] 1 All E.R. 620, 628.

carelessly and unskilfully handled the tractor, and so directed its course, that it came into forcible contact with the piece of timber which was the immediate, the direct and the substantial cause of the accident, and, accordingly, of the plaintiff's injuries. I regard this last act of negligence as in truth constituting what Lord Birkenhead called " a subsequent and severable " act " (1). Accordingly, instead of avoiding the consequences of the plaintiff's negligence, which he had both time and opportunity to do, he committed this further and greater act of negligence of driving into the timber. The conclusion which I have expressed is not merely my view of conflicting testimony. Were it a case of that nature it would be a matter for the jury with which it would not be within our province to interfere. Rather is the conclusion forced upon me by Williamson's own evidence. The plaintiff was in no way responsible for Williamson driving into the timber at a moment of time when, on his own admissions, he ought to have been taking special care. It is wholly immaterial whether this was, as suggested in the evidence, the result of a tea bag getting in his way, or whether it was attributable to mere neglect or inattention. The legal consequence is the same in either case.

Two legal issues still require to be considered. In the first place it is argued that the plaintiff's negligence in standing up in the trailer continued up to the last moment when the impact and resulting accident occurred, and that this continuing and simultaneous negligence on his part deprives him of all right of legal remedy. I cannot accept this as a general proposition of law, though doubtless it would be applicable to the special facts of certain cases. If the proposition had general application it would seem to me that *Davies v. Mann* (2), *Gaffney v. Dublin United Tramway Co.* (3), *McLean v. Bell* (4), and one of our most recent cases *Ross v. McQueen* (5), as well as many other cases, must

(1) *Admiralty Commissioners v. S.S. Volute* [1922] 1 A.C. 129.
(2) (1842) 10 M. & W. 546.
(3) [1916] 2 I.R. 472.
(4) [1932] S.C. (H.L.) 21.
(5) [1947] N.I. 81.

C.A. 1949.

SPROULE v. BOGLE AND WILLIAMSON.

ANDREWS L.C.J.

have been wrongly decided. I cannot subscribe to such an extravagant view.

Next we have had pressed upon us the decision of the House of Lords in *Boy Andrew (Owners) v. St. Rognvald (Owners)* (1). This was a case of a collision in the narrow war-time mine-swept channel in the Firth of Forth. *Davies v. Mann* (2) was distinguished; but, with its venerable antiquity of over a hundred years, it was not over-ruled. As Viscount Simon said its doctrine was inapplicable. At the same time the learned Lord commented upon that decision in terms which call for special attention. "The principle of "*Davies v. Mann*" (2), he said, "has often been "explained as amounting to a rule that when both "parties are careless, the party which has the last "opportunity of avoiding the results of the other's "carelessness is alone liable. The suggested test of "'last opportunity' seems to me inaptly phrased and "likely in some cases to lead to error, as the Law "Revision Committee said in their report (Cmd. 6032 "of 1939, p. 16). 'In truth there is no such rule— "'the question, as in all questions of liability for a "'tortious act, is, not who had the last opportunity "'of avoiding the mischief, but whose act caused the "'wrong?'" It was suggested in this Court that this dictum must be accepted as almost revolutionising the law, as the doctrine of "last opportunity" has in the past found its place in many learned judgments and in the works of text-book writers. I do not, however, regard the learned Viscount's words as intended to have any such far-reaching effect. As I read his words it seems to me that he merely regards the use of the words "last opportunity" as a matter of "inapt phrasing" and he considers that the goal to be aimed at is always whose act caused the wrong. I do not understand this as implying that in arriving at a conclusion on this point it is wrong to put to oneself as a criterion the question as to which party had the last opportunity of avoiding an accident, yet failed to do so. It has always seemed to me to be a most helpful test in the determination of liability.

(1) [1948] A.C. 140. (2) (1842) 10 M. & W. 546.

In this connection I may say that I entirely share the view expressed by Denning L.J. in *Davies v. Swan Motor Co. Ltd.* (1), in which he said that, "if the "doctrine of last opportunity is discredited, so is the "rule in *Davies v. Mann* (2), for, as I have always "understood it, they are one and the same doctrine."

I have felt it my duty out of respect for the arguments addressed to us in this court and the doubts which we are told have arisen, to express, I hope clearly, my views as I have done. It is my present intention as a matter of general practice to continue to put to juries the four questions referred to in *Campbell v. Kelly* (3) in all cases in which there is evidence to support them, and which fall to be determined under the law which existed prior to the passing of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948. I wish to keep entirely open the question as to whether cases arising under the new law may call for modified treatment.

I only wish to add that in arriving at the conclusion which I have done, that the jury's finding in answer to the fourth question cannot be allowed to stand, I have borne in mind the view of the learned trial judge who reports to us that, in his opinion, "the collision "could have been avoided if Williamson had exercised "reasonable care and skill when driving down the "yard." "I thought, therefore," he adds, "that the "jury would have answered question 4 in the affirma-"tive. It was Williamson, and not Sproule, who had "the 'last chance.'" Such view, though, of course, in no way binding on this court, is entitled as an important factor in the case to receive the most careful consideration. Illustrations of this will be found in *Commissioner for Railways v. Brown* (4), *Aitken v. McMeckan* (5), and *Steele v. Gilliland* (6).

In my opinion for the reasons which I have mentioned the finding of the jury to the fourth question submitted to them must be set aside, together with the verdict for the defendants consequent thereon, and judgment

(1) [1949] 1All E.R. 620, 631.
(2) (1842) 10 M. & W. 546.
(3) [1945] N.I. 70.
(4) (1888) 13 App. Cas. 133, 135, 136.
(5) [1895] A.C. 310, 316.
(6) [1928] N.I. 19.

C.A. 1949.

SPROULE v. BOGLE AND WILLIAMSON.

ANDREWS L.C.J.

will be entered in favour of the plaintiff for the sum of £350, the amount assessed by the jury. This, in my opinion, we have full jurisdiction to do under the authority of such cases as *Paquin Ltd. v. Beauclerk* (1), *Winterbotham, Gurney & Co. v. Sibthorp and Cox* (2), *McEvoy Ltd. v. Calder* (3), and *Steele v. Gilliland* (4). The evidence is such that, in my opinion, "only one "conclusion can properly be drawn"; and, for the reasons I mentioned in an earlier part of this judgment, I cannot but think that it is the conclusion which the jury intended to find, but which they failed to do by reason of some mistake or misapprehension as to the meaning of the question.

The plaintiff must have his costs of action, including his costs of this appeal.

BLACK L.J.

BLACK L.J.: Porter L.J., who tried this action, reports that no objection was taken by counsel to the questions submitted by him to the jury. In this court counsel for the defendants frankly admitted that they could not challenge the jury's finding that the defendant Williamson was guilty of negligence. There was clearly ample evidence to support this finding. Also, in my opinion, there was also ample evidence to support the finding that the plaintiff was guilty of contributory negligence. In order to establish contributory negligence on the part of a plaintiff it is not necessary to show that he was guilty of some breach of a legal duty towards the defendant. It is sufficient to show that he was guilty of a failure to use reasonable care for his own safety. The jury was, I think, clearly entitled on the evidence to arrive at the conclusion that the plaintiff, in adopting a standing instead of a sitting posture in the trailer, was gratuitously incurring an appreciable risk, and was taking less care for his own safety than a reasonable man would have done.

The difficulty in the case appears to me to centre round the jury's answer to the fourth question. If the driver of a vehicle becomes aware that one of his passengers has taken up some precarious position on

(1) [1906] A.C. 148.
(2) [1918] 1 K.B. 625.
(3) (1921) 55 I.L.T.R. 121.
(4) [1928] N.I. 19.

the vehicle I think it becomes his duty to order his driving accordingly, and to display in the management of his vehicle the degree of care which is called for by reason of the passenger's risky position. If an accident subsequently takes place through negligent driving on the part of the driver, and the passenger suffers an injury which he would not have sustained if the driver had moderated his driving in the light of his knowledge of the passenger's position, then, although the passenger may well be held to have been guilty of contributory negligence in the sense in which that expression is used in the authorities, yet the driver will be in the position that by the exercise of reasonable care he could have avoided causing the injury to the passenger. This, of course, is nothing more than a specialised example of the rule in *Davies v. Mann* (1). It seems to fall clearly within what is now so frequently cited as the authoritative modern statement of that rule, the passage in Lord Shaw's opinion in *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* (2), where he says: "I take the principle to be that, "although there might be fault in being in a position "which makes an accident possible yet, if the position "is recognized by the other prior to operations which "result in an accident occurring, then the author of "that accident is the party who, recognizing the "position of the other, fails negligently to avoid an "accident which with reasonable conduct on his part "could have been avoided."

Of course in such cases the question of time and opportunity may be of vital importance. The defendant may become apprised of the situation created by the plaintiff's negligence at such a late stage that he has no reasonable opportunity of avoiding the consequences. On this point one need only refer to the speeches of Viscount Birkenhead in *Admiralty Commissioners v. S.S. Volute* (3), and of Viscount Hailsham in *Swadling v. Cooper* (4).

Accordingly it seems to me that the problem submitted to the jury in the fourth question in the present

(1) (1842) 10 M. & W. 546.
(2) [1924] A.C. 406, 420.
(3) [1922] 1 A.C. 129.
(4) [1931] A.C. 1.

C.A. 1949.

SPROULE v. BOGLE AND WILLIAMSON.

BLACK L.J.

case really amounted to this, whether Williamson was aware of the dangerous position which the plaintiff had taken up by standing in the trailer, and if so whether he was aware of it at such point of time that by taking reasonable care in his driving and management of the tractor, he could have avoided causing to a man in that position the injury which in fact occurred.

The negligence on the part of Williamson which caused the accident was his careless or unskilful driving just as the tractor was coming up to the saw-mill. Williamson's own evidence is that he thought that the plaintiff and Speers were sitting in the trailer during the whole of the journey, but that shortly before the accident he heard a shuffling of their feet in the trailer as though they were getting up. Where this took place is a matter of importance. In his direct examination Williamson said he was changing down as he went into the saw-mill yard, and under cross-examination he said that as he changed down he heard the noise in the trailer. Williamson accordingly admits that somewhere about the entrance to the saw-mill yard he was aware that the plaintiff and Speers were either standing up in the trailer or were getting on to their feet. Walker, the only other witness called on behalf of the defendants, who was present at the time of the accident, states categorically that the men were standing in the trailer when coming into the yard. It is, therefore, definitely established that when the tractor was entering the saw-mill yard Williamson was aware that his passengers were in a position which, according to his own evidence, he knew was fraught with danger. With this knowledge it was clearly Williamson's duty, in my view of the law, so to regulate his driving as not to take the risk of throwing men, who were in this unsafe position, off their balance by any sudden jerk or collision. Accordingly, it would appear that the net question in the case comes to be whether from the point when Williamson became aware of the unsafe position of Sproule and Speers, he had sufficient time to enable him to accommodate his driving to this situation. To this question I think there can be only one answer. From the entrance to the saw-mill yard

to the point where the accident occurred is at least fifty yards. At whatever speed he may have been driving—and so far as I can conjecture from the note of the evidence I should be inclined to think that the probabilities are that as the witness Walker says, he was going at a walking pace—Williamson had clearly ample time from his entrance into the yard to realise the unstable position of Sproule and Speers on the trailer, and to bring his vehicles to a standstill at the saw-mill without such a collision as might result in Sproule and Speers being thrown off their balance. In other words, although the plaintiff may have been guilty of lack of proper care for his own safety by standing up in the trailer, yet it is abundantly clear, on Williamson's own evidence, that he became aware of the plaintiff's position at such a stage that by reasonably careful driving he could have avoided the happening of the accident which caused the plaintiff the serious injuries described in the evidence.

The fourth question submitted to the jury was—"If the plaintiff was guilty of contributory negligence "yet would the defendant Richard Williamson by the "exercise of reasonable care and skill, have avoided "the accident?" In my view the only conclusion which can properly be drawn from the evidence is that this question should be answered "Yes."

On the authority then of the line of cases referred to by the Lord Chief Justice, I am of opinion that this court should set aside the judgment entered for the defendants, and, in lieu thereof, should enter judgment for the plaintiff for the amount of damages assessed by the jury.

Appeal allowed.

Solicitors for the appellant: *Shields & Murnaghan*
Solicitor for the respondents: *Gerard J. McCanny.*

M. V. P.

K.B.D. (Probate) 1949.

March 25; April 22.

IN THE GOODS OF HAMPTON ROBINSON (1).

Administration—Death of executor intestate—Application by representative of deceased beneficiary for administration with will annexed de bonis non—Jurisdiction of court—Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 *Vict., c.* 79), *s.* 78.

The jurisdiction of the court under s. 78 of the Probates and Letters of Administration Act (Ireland), 1857, is limited to cases in which the applicant is able to bring his case within one or other of the alternatives therein specified, and there is no inherent jurisdiction in the court which can be exercised merely for the protection of assets.

Accordingly, where a testator left a will with a duly appointed executrix who extracted probate and thereafter died intestate it was *held* that the court would not give liberty to apply for a general grant with the will annexed *de bonis non* to an applicant who averred that as administratrix and universal devisee and legatee of a beneficiary named in the testator's will she was entitled to a house and other property standing in the testator's name as registered owner.

The court, however, made an order giving the applicant liberty to apply for a grant with the will annexed *de bonis non* expressly limited in terms to that part of the testator's property to which the applicant was entitled.

MOTION for an order pursuant to s. 78 of the Probates and Letters of Administration Act (Ireland), 1857, "or otherwise," for liberty to apply for a grant of letters of administration with the will annexed *de bonis non* to the estate of Hampton Robinson, deceased, who died on the 12th February, 1937.

The testator, the Reverend Hampton Robinson, by his will dated the 30th July, 1934, appointed his wife, Elizabeth Jane Selina Robinson, and her brother, the Reverend Canon Robinson, to be executors of the will. Probate of this will was granted on the 8th June, 1937, in the District Probate Registry at Chester to Elizabeth Jane Selina Robinson, the other executor, the Reverend Canon Robinson having duly renounced, and this probate was resealed in Northern Ireland on the 24th November, 1937. Elizabeth Jane Selina Robinson

(1) In the King's Bench Division (Probate) before Andrews L.C.J.

died in Natal on the 20th February, 1947, and by her last will she bequeathed the whole of her estate to her brother the Reverend Canon Robinson, and appointed him executor ; but as the Reverend Canon Robinson had predeceased her, he dying in Natal on the 1st November, 1945, the estate of Elizabeth Jane Selina Robinson was being administered as an intestacy.

By his will the testator bequeathed a life interest in the greater part of his property to his wife Elizabeth Jane Selina Robinson. The provisions subsequent to this life interest were so doubtful in construction that Annie McClure, the applicant in the present case, took out a construction summons in the Chancery Division before Black J. The applicant's claim was made as administratrix with the will annexed and universal devisee and legatee of Robert Robinson, a nephew of the testator and one of the named beneficiaries in the will, who had survived the testator by a few months, he dying on the 18th October, 1937.

Black J. by his order dated the 18th December 1947, held that Robert Robinson was entitled to an absolute interest, after the death of his mother, Elizabeth Robinson, in a house in Tamnificarbet, Portadown, in which his mother was living at the date of the testator's will, i.e., the 30th July, 1934, together with certain other property and rights of property adjoining in Tamnificarbet.

Elizabeth Robinson, the life-tenant, died on the 25th January, 1947, and on or about the 11th February, 1947, Anne Robinson, a niece of the testator, being a daughter of the testator's brother, Joseph Robinson, entered into occupation of the house at Tamnificarbet and had remained in occupation since, notwithstanding the order of Black J. of the 18th December, 1947.

The applicant now applied for an order under s. 78 of the Probates and Letters of Administration Act (Ireland), 1857, " or otherwise," for liberty to apply for a grant of letters of administration with the will annexed *de bonis non* to the estate of the testator, contending that as the property in Tamnificarbet stood in the testator's name as registered owner neither could the trusts of the will relative thereto be carried

K.B.D. (Probate) 1949.

IN THE GOODS OF HAMPTON ROBINSON.

into execution, nor could possession be obtained nor title to the property be made without a grant of letters of administration with the will annexed.

Agnew for the applicant.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J. [after stating the facts as above set out continued] :—

It is in these circumstances that the applicant seeks from the court an order under section 78 of the Probates and Letters of Administration Act (Ireland), 1857, giving her liberty to apply for a *de bonis non* grant (with the will annexed) to the estate of the deceased. There would sometimes appear to me to be a somewhat general opinion in the profession that this section provides a panacea for all the ills, a magic remedy, as it were, for the removal of all the difficulties which present themselves in the obtaining of grants, whether the deceased died testate or intestate. I have pointed out before, and I now do so once again, that nothing could be further from the truth. The section, which is identical with section 73 of the English Court of Probate Act, 1857, is limited in its scope and in its application to the events therein expressly stated. It is only when the applicant is able to bring his case within one or other of the alternatives therein specified that the jurisdiction of the court under the section can be exercised. The facts of the present case, in which the deceased left a will with a duly appointed executrix then resident in the United Kingdom, who was not only willing, but who actually extracted probate, clearly negative the application of the section ; and, accordingly, I must decline to make an order under that section.

The notice of motion, however, as above-mentioned asks for the order to be made under section 78 "*or* "*otherwise.*" As I understood Mr. Agnew's argument, these words were rather directed to some vague, indefinite, inherent jurisdiction which the court not only could, but should, exercise when necessary for the protection of assets, or more generally speaking,

for the due and proper administration of estates of deceased persons. No authority was cited in support of such a jurisdiction, the existence of which would appear to me to be at variance with a jurisdiction expressly conferred by statute in certain specified cases only.

In my opinion, however, the applicant can obtain all the power and authority which she requires by my making an order giving her liberty to apply for a grant of letters of administration with (the will annexed) *de bonis non* expressly limited in terms to that part of deceased's property which is situate in Tamnificarbet. Such a limited grant I consider I have ample jurisdiction to make. The right to such an order so limited is not determined by the degree of relationship, or by the ordinary principles which regulate priority to a grant, but rather by the nature and extent of the applicant's interest in the property. Thus limited, grants in the case of an intestacy may be made to those who are not next of kin, or who are not entitled as a surviving husband or as a widow. Indeed, where the applicant would, after citation of prior parties, be entitled to a general grant, a limited grant will not be made to him unless for some very strong reason and by direction of the judge: R.S.C. Order lxxix, rule 33, and *In the Goods of Watts* (1). As a matter of procedure it is also provided by rule 32 of the same Order that limited administrations shall not be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the judge. On the special facts of this case which I have mentioned, and having regard to the service of the present notice of motion on all the next of kin whose addresses are known, and to the further fact that none of them appeared or was represented on the hearing of the application before me, I have no hesitation in dispensing with formal consents, renunciations or citations. Indeed, in this connection I would call attention to the observation of the learned editors of Mortimer's

(1) (1860) 1 Sw. & Tr. 538.

K.B.D. (Probate) 1949.

IN THE GOODS OF HAMPTON ROBINSON.

ANDREWS L.C.J.

Probate Practice, 2nd Edition, p. 387, in which it is pointed out that if the two rules (rules 32 and 33 of our Order lxxix) are to be strictly enforced, a limited grant could never be made to a legatee; for by the first rule he must, before applying for a limited grant, cite all persons entitled to a general grant, and, when this has been done, the legatee himself becomes entitled to a general grant, and is precluded from taking a limited grant by the second of the two rules. Accordingly, it is stated, that in practice in England these rules, in special circumstances, have been relaxed, first by allowing a legatee to take a limited grant without citing those entitled to the general grant, and, secondly, by allowing a legatee to take a limited grant after citation of those entitled to the general grant in priority to himself. As is my custom I conform to and adopt settled English practice and procedure in the administration of our Probate Jurisdiction.

I only wish to add that in making the order for a limited grant of the character indicated, I am not forgetful of the words of Sir C. Cresswell in *In the Goods of Watson* (1), and in the subsequent case of *In the Goods of Watts* (2). That learned judge certainly did not look with favour upon limited grants where general grants were obtainable, especially if more than one was sought by different persons for different parts of the estate; but in my opinion nothing which he stated in either of those cases interferes with my jurisdiction, or the propriety of my exercise of it by making the order for the limited grant in the present case. The applicant is entitled to her costs but only out of the property to which the grant is limited.

(1) (1858) 1 Sw. & Tr. 110. (2) (1860) 1 Sw. & Tr. 538.

Order accordingly.

Solicitors for the applicant: *T. G. Menary & Co.*

J. McC.

GRAHAM v. BALDRICK (1).

C.A. 1949.

June 8, 14; July 27.

Revenue—Customs—Export of prohibited goods—Horse and cart used for removal and conveyance of goods—Liability to forfeiture —Customs Consolidation Act, 1876 (39 & 40 *Vict., c.* 36), *s.* 202 *—Import, Export and Customs Powers (Defence) Act*, 1939 (2 & 3 *Geo.* 6, *c.* 69), *s.* 3 (1).

By s. 202 of the Customs Consolidation Act, 1876, "all ships, "boats, carriages, or other conveyances, together with all horses "and other animals and things made use of in the importation, "landing, removal, or conveyance of any uncustomed, prohibited, "restricted, or other goods liable to forfeiture under the Customs "Acts shall be forfeited . . ."

A labourer employed by a farmer used the farmer's horse and cart without authority in order to carry from Northern Ireland into Eire by an unapproved road goods which were prohibited goods under the Import, Export and Customs Powers (Defence) Act, 1939.

Held, by the Court of Appeal (Andrews L.C.J. and Porter L.J., Black L.J. dissenting) that the words "importation, landing, "removal, or conveyance" referred to four different stages in connection with the arrival of goods in the United Kingdom and the disposition of imported goods, and could not be extended to cover the exportation of goods from the United Kingdom, and that accordingly the horse and cart were not liable to forfeiture.

CASE STATED by the Recorder of Londonderry.

On the 9th July, 1947, at Londonderry Petty Sessions the appellant, an officer of customs and excise, proceeded against the respondent for the forfeiture and condemnation of a horse and cart under the provisions of s. 202 of the Customs Consolidation Act, 1876.

The respondent carried on business as a farmer and had in his employment as a labourer one Albert Lynch. On the 13th April, 1947, Lynch carried in the respondent's horse and cart four hundredweight of fertilisers from Northern Ireland into Eire by an unapproved road contrary to the respondent's orders. Under the Import, Export and Customs Powers (Defence) Act, 1939, and the regulations made thereunder these fertilisers were prohibited goods when exported.

(1) In the Court of Appeal before Andrews L.C.J., Porter and Black L.JJ.

C.A. 1949.

GRAHAM v. BALDRICK.

On the 1st May, 1947, the respondent was called on to furnish proof under s. 3 (1) of the Import, Export and Customs Powers (Defence) Act, 1939, and he then stated to the customs officer : " What proof can I give " you or what proof do you want ? I have no licence " to export fertilisers." On the 11th May, 1947, the respondent's horse and cart were seized under s. 202 of the Customs Consolidation Act, 1876, and were claimed by the respondent on the 7th June, 1947.

At the hearing at petty sessions the resident magistrate dismissed the summons on the merits. The appellant appealed, and the appeal was heard by the Recorder of Londonderry on the 30th September, 1947. Without calling on the respondent the learned Recorder affirmed the decision of the resident magistrate on the ground that the use of the horse and cart in this exportation did not amount in law to " importation, " landing, removal, or conveyance " of prohibited goods under s. 202 of the Customs Consolidation Act, 1876, so as to cause the horse and cart to be forfeited.

On the application of the appellant the learned Recorder stated this case for the opinion of the Supreme Court. The question raised in the case stated was whether the Recorder was right in law in holding that the words " importation, landing, removal, or con- " veyance " in s. 202 of the Customs Consolidation Act, 1876, do not include exportation.

Harrison K.C. and *Shaw* for the appellant.
O'Donnell for the respondent.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J. : The net question in this case stated is whether the use of the defendant Baldrick's horse and cart in the exportation from Northern Ireland to Eire of certain fertilisers which, by virtue of section 3 (1) of the Import, Export and Customs Powers (Defence) Act, 1939, and Order 1661 of the year 1946 (S.R.O. 1946, p. 321) made thereunder, were deemed to be " prohibited goods," liable to forfeiture under the Customs Acts, amounts in law to

an "importation, landing, removal or conveyance" of prohibited goods under section 202 of the Customs Consolidation Act, 1876, so as to cause or render the said horse and cart liable to be forfeited.

The appellant, Graham, is an officer of Customs and Excise; the respondent a farmer, who had in his employment, as a labourer, a man called Lynch. On the 13th May, 1947, Lynch "removed," or, as I would prefer to express it by a neutral word, carried the fertilisers in the respondent's horse and cart from Northern Ireland into Eire by an unapproved road, contrary to the respondent's orders. The respondent admitted that he had no licence to export fertilisers. The horse and cart were seized under section 202 of the Customs Consolidation Act, 1876, on the 15th May, 1947, and were claimed by the respondent under section 207 of the Act on the 7th June, 1947. The fertilisers, which had been so taken to Eire, have not been seized. On the 9th July, 1947, the appellant proceeded by information and summons against the respondent at Londonderry Petty Sessions, in accordance with the provisions of section 207 of the Act of 1876 for the forfeiture and condemnation of the said horse and cart. The magistrate dismissed the summons on the merits. On appeal, the learned Recorder of Londonderry, without calling upon the respondent, refused to make an order for the condemnation of the horse and cart, and, accordingly, affirmed the decision of the resident magistrate, stating this case for the opinion of this court as to whether he was right in law in holding that the words "importa-" tion, landing, removal or conveyance," in section 202 of the 1876 Act, do not include exportation.

The issue is one of law and must be considered and decided as such. On the merits, were they open to us, one could not avoid having sympathy for a man whose horse and cart were used for this unlawful purpose, not only without his knowledge, but, as found in the case, "contrary to his orders." It is, however, admitted that *mens rea* is not an essential ingredient of proof in proceedings for forfeiture and condemnation where a seizure has been made under section 202 of the Act.

C.A. 1949.

GRAHAM v. BALDRICK.

ANDREWS L.C.J.

If the owner is innocent his only remedy is by appeal to the Commissioners for restoration under section 209 of the Act, now replaced by section 35 of the Inland Revenue Regulation Act, 1890, as applied by clause 24 of the Excise Transfer Order, 1909. In this respect it differs from proceedings under section 186 of the Act, such as being knowingly concerned in the carrying or removal of prohibited goods : *Emerson v. Woods* (1). I should add that the summons against the respondent under this latter section was dismissed by the magistrate, *mens rea* not being proved, and from this portion of his order no appeal was taken. Lynch accepted full responsibility for that offence, and pleaded guilty.

The material words of section 202, with which we are mainly concerned in the present case stated, are as follows :—

> " All ships, boats, carriages, or other conveyances, " together with all horses and other animals and " things made use of in the importation, landing, " removal or conveyance of any uncustomed, pro- " hibited, restricted, or other goods liable to " forfeiture under the Customs Acts shall be " forfeited . . ."

In interpreting the words of this section, and, in particular, the meaning of the words " importation, " landing, removal or conveyance " on which this case largely depends, two important facts must be borne in mind :—(1) That at the date of the passing of the Act of 1876 there was no land boundary to the United Kingdom, such as that which now exists between Northern Ireland and Eire ; and (2) That the Act of 1876 was primarily designed against the offence of smuggling by unauthorised importation into the United Kingdom without the payment of customs duties, the sections relating to exportation (ss. 100–139) being of limited scope, and in my opinion of relatively less importance.

After much thought I have formed the clear opinion that it was not the intention of the Legislature to include the exportation of goods in the words " im- " portation, landing, removal or conveyance," so as to

(1) [1942] N.I. 118.

render forfeited " all ships, boats, carriages, or other " conveyances, together with all horses and other " animals and things made use of " in such exportation. Mr. Harrison, in his closely reasoned argument on behalf of the appellant, submitted the view that the words " importation " and " landing " related to, and were appropriate words with which to refer to the importation of goods into the United Kingdom, whilst the words " removal " and " conveyance " were concerned with, and were intended by the Legislature to refer to matters incident to the exportation of goods. At one time he appeared to me to be placing the greater reliance on the word " removal "; but, ultimately, he laid greater stress on " conveyance." He is, of course, entitled to rely upon them both. I am quite unable, however, to accept his interpretation. The whole four words were, in my opinion, intended by Parliament to refer to four different stages in connection with the arrival in the United Kingdom and the disposition of imported goods. The four operations, bearing in mind, as I have already stated, that there was in 1876 no land boundary, were in their natural, or as Mr. O'Donnell called it, their logical sequence—the bringing of the goods in ships into the ports, the landing of them on the quayside, the removal of them to the warehouses, and in such case the subsequent conveyance of them for distribution and disposal. Many sections of the Act could be referred to which show that the Legislature directly and intimately associated the word " removal " with warehouses. Indeed, sections 88–96 inclusive fall within a portion of the Act entitled " As to the " removal of warehoused goods." I would further point out that the use of the words " for removal or " exportation " in sections 115 and 116 of the Act indicate clearly that Parliament did not regard the terms as synonymous. Neither are they.

" Conveyance " is, I admit, a word of more general import and application; but how unfortunate Parliament was in expressing its meaning and intention if that word " conveyance " was intended to introduce into this very penal section the wholly different operation of exportation, placing it, as it were, on a par with

C.A. 1949.

GRAHAM v. BALDRICK.

ANDREWS L.C.J.

that of importation which is expressly mentioned. I need not refer by name to the mass of authority which firmly establishes the principle that, whilst penal statutes, like other instruments, must be interpreted according to the fair and reasonable meaning of the language used, yet they should be construed strictly, so that no one shall be held to be reached by them but such as are within both the spirit and letter of such laws.

I have already indicated that the Act does contain provision for the prohibiting of certain goods of a limited character for export. Thus arms, ammunition, gunpowder, military and naval stores, etc., may be prohibited for export by proclamation or Order in Council made under section 138 of the Act (replaced by section 8 of the Customs and Inland Revenue Act, 1879); but in my opinion this very fact, though strongly relied upon by the appellant, provides one of the most powerful arguments against him; for, with this provision keenly present as it must have been to the mind of the Legislature, it is incomprehensible how, if section 202 was intended to include the carriage of goods for export, the word exportation, which I may call the correlative term to importation, should be omitted from the section, whilst the latter term—importation—was expressly included. I could have much better understood the argument in favour of the wider meaning being given to the word "conveyance" if the word "importation" had been omitted from the section, but it has not been; and its very presence makes provision which would otherwise be absent for the application of the *ejusdem generis*, or, as it is perhaps more appropriately called in the present case, the *noscitur a sociis* doctrine—a rule of construction, which, I agree with Rigby L.J. in *Smelting Company of Australia v. Commissioners of Inland Revenue* (1), ought to be applied with great caution when its application involves a departure from the natural meaning of words in order to give them a meaning which may or may not have been the

(1) [1897] 1 Q.B. 175, 181, 182.

intention of the Legislature. Yet it is a doctrine the existence of which has been long recognised. Lopes L.J. reaffirms it in his judgment in the same case ; and it has at times proved of the utmost value in legal interpretation where ambiguity and consequent uncertainty exists. I can see no reason why it may not be safely called to our aid in the present case.

If the question be asked why Parliament should have imposed the penalty of forfeiture provided for by section 202 in the case of the importation of prohibited goods, yet not in the case of the exportation of such goods, I have only one reason to offer in addition to what I have already stated, namely, that, unlike importation, in which case certain goods are expressly " prohibited to be imported " by section 42 of the 1876 Act, no goods are expressly prohibited to be exported by that Act. The Act contains merely provision for such prohibition at some future time by proclamation or Order in Council. It may well have been thought unnecessary to provide such a drastic remedy as a forfeiture of this character for a contingency which might never eventuate.

I had written the foregoing part of my judgment when I turned to the Customs Consolidation Act, 1853, which had not been referred to in argument, on the chance, rather than in the hope, that some light might be thrown upon our problem by a perusal of its provisions. The result of my inquiry was more confirmatory of the view which I have expressed than I could have expected. The section of that Act, which, though much shorter than section 202 of the Act of 1876, yet clearly corresponds with it, is section 222. It is couched in the following terms :—

> " All ships, boats, carriages, or other means of " conveyance, together with all horses and other " animals made use of in the removal, carriage, or " conveyance of any goods liable to forfeiture under " this or any other Act relating to the Customs, " shall be forfeited."

Thus it is clear that Parliament in the year 1876 considered that section 222 of the Act of 1853 called for amendment in order to include, or at least to

C.A. 1949.

GRAHAM v. BALDRICK.

ANDREWS L.C.J.

remove doubts as to the non inclusion of the use of the articles named in connection with importation. It is wholly immaterial which of these alternatives operated on the Parliamentary mind. The words "removal" and "conveyance," strengthened even with the word "carriage," were not deemed sufficient for the purpose. Hence the word "importation" was introduced into section 202 of the Act of 1876. If this was necessary in the case of importation, it is not in my opinion overstating the position to say that *a fortiori* it was necessary in the case of exportation, if it was intended by Parliament that the section should apply in such a case. The amendment of the section, however, did not include the word "exportation"; and the only reasonable inference in such circumstances is that it was not intended to include it, and that the word was, accordingly, deliberately omitted.

In my opinion there can be no doubt as to the legitimacy of this line of argument in the construction of section 202. Thus Lord Herschell in *Bank of England v. Vagliano Brothers* (1) makes it clear that resort may be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code when they are of doubtful import. This view was affirmed by Lord Watson in the following year when delivering the opinion of the Privy Council in *Robinson v. Canadian Pacific Railway Co.* (2).

But then it is argued that, whatever doubts there may have been under the Act of 1876, the situation is clarified by section 3 (1) of the Import, Export and Customs Powers (Defence) Act, 1939, by which it is provided (*inter alia*) that "if any goods are imported, "exported . . . in contravention of an order under "this Act . . . or are brought to any quay or other "place . . . for the purpose of being exported . . . in "contravention of such an Order those goods shall be "deemed to be prohibited goods and shall be for-"feited . . ." It is admitted that the fertilisers which were carried in the defendant's cart, and so exported into Eire, were "prohibited goods" under the Exports of Goods (Control) Consolidation Order,

(1) [1891] A.C. 107, 145. (2) [1892] A.C. 481, 487.

1946, made under the Act of 1939, and so were liable to forfeiture. It is further argued that by section 9 (2) of the Act of 1939 it is provided that that Act shall be construed as one with the Customs Consolidation Act, 1876, and the enactments amending that Act; and that, accordingly, the provisions of section 202 of the Act of 1876 are made applicable to the exportation of these prohibited goods. This conclusion, however, I am unable to accept. In the first place, the Act of 1939 does not contain any amendment of section 202 by the introduction of the word "exportation." Section 3 (1) creates the offence, by deeming the goods to be prohibited goods, and it provides the remedy, and, in my opinion consequently, the only remedy. That remedy is twofold in character:—(1) the forfeiture of the goods; and (2) the *exporter* of the goods or his agent shall be liable, in addition to any other penalty under the enactments relating to customs, to a customs penalty of £500. We are not concerned in the present case with the first of these remedies—the forfeiture of the goods, which were left in Eire, apparently never seized, and presumably long since disposed of. As for the second remedy, which is only available against the exporter, the complete answer, as it appears to me, is that, on the facts stated in the case, the defendant was not "the exporter" of these fertilisers. There is no definite finding that the fertilisers which were exported were the property of the defendant; but, however that may be, it would be absurd to say that he was the exporter merely because his horse and cart were used by Lynch for such exportation when it was made without his consent, and in fact contrary to his orders. This finding negatives the application of section 202 to the present case. I am aware that it has been held in *Lord Advocate v. Crookshanks* (1) that the mere use of a vehicle or of horses for the conveyance of uncustomed goods is sufficient ground for the forfeiture under section 202 irrespective of any knowledge or consent on the part of the owner, and that if the owner is innocent his only remedy is by appeal to the Commissioners for restoration under section 209 (now

(1) (1888) 15 R. 995.

C.A. 1949.

GRAHAM v. BALDRICK.

ANDREWS L.C.J.

replaced by clause 24 of Excise Transfer Order, 1909) (see Highmore, 3rd Edition, pp. 241 and 249) ; but this decision was in the case of an offence under the Act of 1876 ; and, on the assumption that I am right in holding that this case of exportation did not fall within section 202, it could only be applied to the present exportation as against the exporter, Lynch, and not otherwise.

For these reasons I am clearly of opinion that the learned Recorder was correct in his opinion, and that the question which he has submitted to us should be answered in the affirmative. We allow the defendant his costs of the case stated, measured at twenty-five guineas.

PORTER L.J.

PORTER L.J. : The fertilisers which were carried across the border by the respondent's horse and cart are deemed to be prohibited goods and liable to forfeiture under the Import Export and Customs Powers (Defence) Act, 1939, section 3 (1), but the learned Recorder held that the use of the horse and cart in such exportation did not in law amount to the " im- " portation landing removal or conveyance of prohibited " goods " under section 202 of the Customs Consolidation Act, 1876, so as to cause the horse and cart to be forfeited, and the question for this court is whether he was right in so deciding.

Mr. Harrison in his elaborate and very able argument for the appellant contended that the words " removal or conveyance " were used in a popular sense implying every kind of carriage whether by sea or land, that the prohibited and restricted goods referred to in the section comprised all goods to which any prohibition or restriction in respect of exportation and importation was applicable, and that since the fertilisers were prohibited goods and liable to forfeiture as such, the carriage of them across the border was a " removal or conveyance " of them which rendered the horse and cart liable to forfeiture.

The case for the respondent was conducted with considerable skill by Mr. O'Donnell who relied strongly upon the omission of the word exportation in a series

of words in which " importation " was specifically mentioned as the leading word in the series, that the order of the words " importation landing removal or " conveyance " clearly indicated the ordinary, or as he called it the logical, sequence of operations when goods are being imported, and that these words in the absence of the word exportation proved that the only object of the section was to deal with the smuggling of goods into the United Kingdom. He also referred to section 3 (*b*) of the Trading with the Enemy and Export of Prohibited Goods Act, 1916, which was passed to remove doubts as to the meaning of the words " prohibited " and " restricted " in section 186 of the 1876 Act, and pointed out that the wider meaning which included exports as well as imports applied only to section 186 and were in that case subject to the further limitation " except where the context otherwise " requires."

The inference which he sought to draw from this amending enactment was that prior to the passing of the Import Export and Customs Powers (Defence) Act, 1939, the Legislature recognized that there was doubt as to the meaning of the words " prohibited " and " restricted " and he argued that if section 202 had been intended to apply to exportation as it does to importation, it should and probably would have been included in the amending Act.

The language of the section has been subjected to an exhaustive and critical examination by counsel on either side. Passing over the difference in meaning between " conveyance " as the act of conveying and " conveyances " as the vehicles used in the act, I do think it remarkable that if the section was aimed at exports as well as imports the Legislature did not specifically say so, which could easily have been done by the insertion of words like " exportation " and " lading " to correspond to the words " importation " and " landing," instead of leaving the inference to be drawn from the ambiguous words " removal or " conveyance." This is all the more remarkable when one compares the words of section 222 of the Customs Consolidation Act, 1853, with the words of

C.A. 1949.

GRAHAM v. BALDRICK.

PORTER L.J.

this section, which is obviously a copy with slight alterations of the words of the earlier Act. Section 222 runs as follows :—" All ships, boats, carriages or other " means of conveyance together with all horses or " other animals made use of in the removal, carriage " or conveyance of any goods liable to forfeiture under " this or any other Act relating to the customs shall " be forfeited."

Prima facie this section would seem to apply to exports as well as to imports, but if at that time there was no prohibition on the export of goods (as indeed I think was the case) the Legislature may very well have intended the section to apply only to imported goods. Why then was the section amended in the Act of 1876 so as to include the significant words " importation " and " landing " ? Why was " export- " ation " omitted at the same time ? I am inclined to infer that the omission was not *per incuriam*, but was deliberate, and that the intention of the Legislature was to make it clear that the section referred to imported goods only. There are two considerations which lend weight to this inference. Firstly, the predominant object of the sections dealing with smuggling was to protect the revenue against the evasion of customs duties on imports, and secondly in the meantime between 1853 and 1876 there had occurred the American Civil War of 1861-1865 which created differences and very serious disputes between the British Government and the Government of the United States with regard to the export of ships, equipment and goods of all descriptions to North America, and the Legislature, perhaps for the purpose of avoiding international complications, introduced the words " importation " and " landing " to give a definite or perhaps I should say, a less ambiguous meaning to the section.

The word " conveyance " is used in various sections as meaning carriage of goods by land or by sea, and is an apt word to apply to exportation as well as to importation, but whether it should be applied to one or other or to both must be determined by an examination of the context. The word *removal* is frequently

used throughout the Act in connection with various circumstances :—(*a*) Removal from one boat or ship to another (s. 48) ; (*b*) Removal from ship to land (ss. 48 and 177) ; (*c*) Removal to or from warehouse (ss. 51, 61, 76, 77, 83, 177, 186) ; (*d*) Removal from one warehouse to another or from one port to another (ss. 88, 89, 95) ; (*e*) Removal of spirits to the Isle of Man or parts beyond the seas (s. 103) ; (*f*) Removal from carriage, cart, lighter quay or other place prior to exportation (ss. 115, 186) ; (*g*) Removal to a quay, wharf or other place in the Channel Islands (ss. 157, 162).

One may well ask does the word in section 202 cover all these operations, or if it does not, to which of them does it refer ?

In criticizing the draftsmanship of the Act, I observe that there is some overlapping between section 172 and the section we are discussing because in section 172 the ships and boats engaged in the illegal operations were declared to be forfeited and there appears to be no reason why a second declaration of forfeiture should have been inserted in section 202. The probable explanation is that the draftsman of section 172 copied section 203 of the earlier Act in its entirety and subsequently took the two sections, 222 and 223 of the earlier Act and combined them with slight alterations in section 202 of the later Act.

The relative unimportance of the exportation as compared with the importation of prohibited goods, at all events prior to the passing of the 1939 Act, is shewn by a reference to the sections dealing with smuggling—that is to say sections 169 to 247. There is, I think, only one of these sections which contains a specific reference to exportation, viz., section 177, and this is not difficult to understand when one bears in mind that the predominant object of the provisions against smuggling was to safeguard the revenue by taking precautions against the importation of uncustomed goods.

It should also be observed that section 202 is one of a closely related series of sections dealing with imported goods only. The immediately preceding section 201 provides that any goods offered for sale " under

C.A. 1949.

GRAHAM v. BALDRICK.

PORTER L.J.

" pretence that the same are prohibited or have been " unshipped or run ashore without payment of duties " are to be forfeited. The reference is obviously to uncustomed goods such as wines, spirits, tobacco, etc., and indeed there would be neither sense nor reason in offering for sale goods which were prohibited to be exported.

In the following sections 203, 204 and 205, officers of customs and others employed for the prevention of smuggling are authorized upon reasonable suspicion or probable cause to stop and examine any cart, wagon or other conveyance to ascertain whether there are any smuggled goods therein, and they are also given further powers to enter and search any house, shop, cellar, warehouse, etc., and to break open doors, chests, trunks and other packages and to seize and carry away uncustomed or prohibited goods. The reference to *smuggled* goods in these sections cannot mean goods which are being carried or concealed in order to be exported and must refer to goods which have evaded customs duties on importation.

In my opinion these sections which precede and follow section 202 ought to be considered in determining whether the words in question refer to exportation as well as importation.

The words prohibited restricted and liable to forfeiture are used throughout the Act as applicable : (*a*) to imported goods only, or (*b*) to exported goods only, or (*c*) to both imported and exported goods. The absence of the word exportation is, in my opinion, deliberate, and is all the more remarkable seeing that in sections 100 to 139 the words export, exported, exporting and exportation are used with such extraordinary frequency.

The case for the appellant depends upon the linking up of the words " removal " and " conveyance " with the words " prohibited, restricted and liable to for- " feiture." No doubt they are capable of including both imports and exports when isolated from their context, but I think we ought to construe the section not by ignoring those words which are applicable to imported goods only, viz.—" importation," " landing "

and " uncustomed " and by picking and choosing those words which have a doubtful or ambiguous meaning and are capable of referring either to imported goods or to exported goods or to both, but by giving a fair and reasonable meaning to the section, which can only be done by attributing to each word a signification which is not inconsistent with the entire context.

There is one section in the Act which was not mentioned in the course of the argument, viz., section 162, which shows that the draftsman of the Act knew how to use and did use appropriate words when it was desired to deal with the unlawful exportation and importation of goods.

It is as follows :—" No spirits (except rum or " British spirits) shall be *imported into* or *exported from* " the Channel Islands or any of them, or be *removed* " from any one to any other of said islands, or be " *carried* coastwise from any one part to any other " part of said islands, or shall be *shipped* in order to " be so removed or carried in any ship other than of " the burden of forty tons or upwards or in any cask or " other vessel capable of containing liquids not being " of the size or contents of twenty gallons at the least if " foreign or nine gallons at the least if British or Irish ; " and all spirits *imported, exported, removed, carried,* or " waterborne to be so *shipped, removed,* or *carried* " contrary hereto, shall be forfeited, together with " the ship, and any boat *importing, exporting, removing,* " or *carrying the same.*"

Here we find words relating to the carrying and removal of goods repeated three times not as synonymous with either exportation or importation in the ordinary meaning of those words throughout the Act, but as operations differing from though not perhaps unconnected with the export as well as the import of uncustomed or prohibited goods.

When one compares the clear and explicit language of this section with the words of section 202 and bears in mind the significant omission of the word " exporta- " tion " in the latter section there is, in my opinion, a very strong presumption that the Legislature did not intend section 202 to refer to the exportation of goods.

C.A. 1949.

GRAHAM v. BALDRICK.

PORTER L.J.

De Keyser v. British Railway Traffic and Electric Co. Ltd. (1) which was cited to us by Mr. Harrison has no bearing whatever upon the present case. The only question there argued was whether the justices were bound to condemn the tank wagon of an innocent owner which was loaded with petrol from the Thameshaven Oil Wharves. The driver after loading the petrol had illegally mixed 75 gallons of kerosene with the petrol and the mixture was therefore liable to be forfeited under section 4 (2) of the Finance (No. 2) Act, 1931.

The court following the decision in *Lord Advocate v. Crookshank* (2) held that the justices were bound to condemn the vehicle. The case in no way assists the appellant. The petrol was being carried from the Oil Wharves at Thameshaven and was, as one would expect, *imported* petrol.

Even if I were wrong in the conclusion which I have formed my judgment would, nevertheless, be in favour of the respondent on the ground that section 202 is a penal section and that we should not hold that a penalty has been incurred unless the language of the clause is so clear that the case must necessarily be within it. In a case of this kind we are bound to apply that strict and cautionary interpretation which the Courts are in the habit of giving to such clauses : *Tuck & Sons v. Priester* (3), *Remmington v. Larchin* (4).

The rule is stated in Maxwell, *Interpretation of Statutes :* 6th Ed. 500: " Where an equivocal word or " ambiguous sentence leaves a reasonable doubt of the " meaning which canons of interpretation fail to solve " the benefit of the doubt should be given to the " subject and against the Legislature which has failed " to explain itself."

In my opinion the learned Recorder's decision was right.

(1) [1936] 1 K.B. 224.
(2) (1888) 15 R. 995.
(3) (1887) 19 Q.B.D. 629.
(4) [1921] 3 K.B. 404.

BLACK L.J. : This case turns upon a narrow point of construction. The question at issue is whether the provisions of section 202 of the Customs Law Consolidation Act, 1876, include and render liable to forfeiture vehicles which have been used for the exportation into Eire of goods deemed to be prohibited goods and liable to forfeiture by reason of having been illegally exported in contravention of an order made under the Import Export and Customs Powers (Defence) Act, 1939.

Section 3 of this last mentioned Act provides that if any goods are brought to any quay or other place for the purpose of being exported in contravention of an order under the Act those goods shall be deemed to be prohibited goods and shall be forfeited. It was conceded for the purpose of the argument in this court that the fertilisers, which it was alleged that the respondent's horse and cart had been used to convey into Eire, had, under the provisions of this section 3 of the Act of 1939, become prohibited goods and liable to forfeiture. If the fertilisers were exported to Eire, as alleged, in contravention of an order made under the Act they must necessarily have been brought to some " quay or other place " for the purpose of being exported, and would, accordingly, become deemed to be prohibited goods and liable to forfeiture under the provisions of section 3. It has been decided by the King's Bench Division in *Emerson v. Woods* (1) that the words " other place " which are used in the section are to be construed widely and not in any narrow sense as applying only to places *ejusdem generis* with " quay." And this view appears to have been accepted without question by this court in *Dixon v. McAllister* (2).

By section 9 (2) of this Act of 1939 it is directed that it shall be construed as one with the Customs Consolidation Act, 1876, and the enactments amending that Act. Section 202 of the Act of 1876 (which is the section that we have particularly to consider) enacts that all ships, boats, carriages, or other conveyances, together with all horses and other animals and things made use of in the importation, landing, removal. or conveyance of any uncustomed, prohibited, restricted,

(1) [1942] N.I. 118. (2) [1945] N.I. 48.

C.A. 1949.

GRAHAM v. BALDRICK.

BLACK L.J.

or other goods liable to forfeiture under the Customs Acts, shall be forfeited. By section 284 of the Act of 1876 it is provided that the term "Customs Acts" shall mean and include that Act and all or any other Acts or Act relating to the Customs. As the Act of 1939 is to be construed as one with the Act of 1876 it is clear that the phrase "prohibited, restricted, or "other goods liable to forfeiture under the Customs "Acts," which is used in section 202 of the Act of 1876, must be read as including goods deemed to be prohibited goods and liable to forfeiture under the provisions of section 3 of the Act of 1939.

The learned Recorder of Londonderry held as a matter of law that on the assumption that the fertilisers were prohibited goods and liable to forfeiture under the Customs Acts, yet, nevertheless, the use of the respondent's horse and cart to convey those goods into Eire did not, in law, amount to an "importation, "landing, removal, or conveyance" of prohibited goods under section 202 of the Act of 1876, so as to cause the horse and cart to be forfeited. It is this decision of the learned Recorder which is challenged in the present case stated.

It has been laid down time and again, and it cannot be too often repeated, that the first and most important rule to be applied in the interpretation of an Act of Parliament is that the words of the Act are to be construed according to their natural and ordinary meaning, unless there is some very strong reason why they should not be so construed. Section 202 of the Act of 1876 enacts that "all . . . conveyances together "with all horses and other animals . . . made use of "in the . . . conveyance of any . . . prohibited . . . "or other goods liable to forfeiture under the Customs "Acts shall be forfeited." Construing these words according to their ordinary and natural meaning they are clearly wide enough to cover horses and carts used for the conveyance of prohibited goods of any kind, whether the prohibited goods are goods the importation of which is prohibited, or whether they are prohibited goods by reason of their having been brought to some place for the purpose of being exported in contravention of an order made under the Act of 1939. For

my part I can see no reason why some narrower and artificial meaning should be given to the words used in section 202, so as to confine the liability to forfeiture to conveyances used in connection with the transport of goods illegally imported, and to exempt from liability to forfeiture conveyances used in connection with the illegal export of prohibited goods.

It is said, however, that section 202 is a penal section and must be construed strictly. I agree, of course, that penal sections in Acts of Parliament must be construed strictly in cases where there is any ambiguity. I do not agree, however, that a narrow and wholly artificial construction should be placed upon a penal section so as to escape its plain meaning. But it is said that the words "importation, landing, "removal, or conveyance" must be read closely together, and being so read together must be taken as referring to four successive stages of the process of smuggling goods into a country. The words removal and conveyance, it is contended, must be read in close connection with the words importation and landing, and as dealing with the ultimate stages of distributing goods which have been illegally imported. The conveyance referred to in section 202 must, it is said, be a conveyance in close association with the importation referred to a few words previously. Why, however, this should be I do not know. Once goods have been illegally imported they become liable to forfeiture under section 177 of the Act of 1876 no matter at what distance they may be found from the port of importation, and no matter what interval of time may have elapsed. So also will any vehicle used for conveying them become liable to forfeiture under section 202, wherever and whenever it is so employed. Accordingly, in the case of illegally imported goods there need not be any close association with either the time or the place of their importation in order to bring into operation the provisions of section 202 in regard to a vehicle used for conveying them. The close association relied upon must, therefore, be an association with the very fact of importation. The suggestion is that the words removal and conveyance,

C.A. 1949.

GRAHAM v. BALDRICK

BLACK L.J.

following as they do the words importation and landing, must be read in a narrow sense on a sort of *noscitur a sociis* principle. I find difficulty, however, in understanding this argument. I cannot see any difference in the meaning of such words as " removal " and " conveyance " depending on whether they are concerned with goods illegally imported or with goods for illegal export. The processes of removal and conveyance appear to me to be quite the same, no matter to which class of goods they are applied. I cannot see any possible ambiguity about the meanings of those two words. I think that the respondent's contention when examined will, on analysis, be found really to be, not that there is any ambiguity in the words removal and conveyance, but that the alleged ambiguity resides in the words " prohibited goods " and that those words must, in section 202, be read in a narrow sense, not including goods whose export is prohibited but taking a colour from the words " im- " portation " and " landing " and referring only to goods whose importation is prohibited. It would be odd, however, if the phrase " prohibited goods " in section 202 was to be given this narrow meaning. Goods whose export was or might be prohibited were not unknown in 1876. The Legislature was so far interested in goods of that type as to provide, by section 177 of the 1876 Act, that if any goods which were prohibited to be exported should be put on board any ship or boat with intent to be laden or shipped for exportation, or should be brought to any quay, wharf, or other place in the United Kingdom in order to be put on board any ship for the purpose of being exported, such goods should be forfeited. So far from indicating that the phrase " prohibited goods " as used in section 202 was to be construed in a narrow sense the Legislature, by adding in the section the perfectly wide and general form of words " or other

"goods liable to forfeiture under the Customs Acts" appears to me to have intended that the range of goods which was to render the vehicles carrying them liable to forfeiture was the whole range of goods which were in any circumstances declared liable to forfeiture under the provisions of the Acts.

As I indicated at the outset I think that section 202 must be construed according to its plain and literal meaning. Its plain and literal meaning is clear. Personally I think there is no ambiguity in the phrase which we have to construe. . The respondent's case must be based on the contention that an ambiguity does exist. If an ambiguity exists then, inasmuch as the Act of 1876 is a consolidation Act, it is permissible to look at the previous legislation on the subject. Section 150 of the Customs Consolidation Act, 1853, in terms corresponding to those of section 138 of the Act of 1876, authorized the prohibition by proclamation or Order in Council of the export of arms, ammunition, and military and naval stores. Section 209 of the Act of 1853, like section 177 of the Act of 1876, provided that if any goods prohibited to be exported should be put on board any ship or boat with intent to be laden or shipped for exportation, or should be brought to any quay, wharf, or other place in the United Kingdom in order to be put on board any ship or boat for the purpose of being exported, all such goods should be forfeited. Section 222—quite a short section—provided that all ships, boats, carriages, or other means of conveyance, together with all horses and other animals made use of in the removal, carriage, or conveyance of any goods liable to forfeiture under the Act of 1853 or any other Act relating to the Customs, should be forfeited. It would seem clear and beyond dispute that under this legislation any vehicles used in the carriage of prohibited goods brought to any place for illegal export, as well as those used in the carriage of illegally imported goods, would be liable to forfeiture. And indeed this appears quite natural. The considerations which would suggest to the Legislature the desirability of imposing the sanction of forfeiture in regard to vehicles used in the carriage of goods

C.A. 1949.

GRAHAM v. BALDRICK

BLACK L.J.

illegally imported would appear, so far as one can see, to be equally applicable to the case of vehicles used in connection with illegal export. At any rate this was clearly the position under the Act of 1853. It would seem strange if the Legislature intended to alter this policy in 1876, and while preserving the provisions rendering vehicles used in the carriage of illegally imported goods liable to forfeiture, decided for the future to relieve from this liability vehicles used in connection with illegal export. And if the Legislature did intend to effect this alteration of policy one would have expected them to do so by clear and unambiguous words; but if the respondent's argument is correct they proceeded for some reason to carry out the alleged change in a curiously oblique and obscure way. When one reads section 202 of the Act of 1876 side by side with section 222 of the Act of 1853 one gets the impression that by the alterations which they made in the wording of the section the intention of the Legislature in 1876 was to elaborate, and perhaps to add to, but certainly not to subtract from the wide provisions of the old section. I would find it very difficult to read section 202 as whittling down the provisions of the earlier Act and relieving vehicles from liability to forfeiture in circumstances in which they would certainly have been held to be forfeited under section 222 of the Act of 1853. However this may be, the Act of 1876 enacted in general terms that all conveyances together with all horses and other animals used in the conveyance either of prohibited goods or of other goods liable to forfeiture under the Customs Acts should be forfeited. I see no escape from the general terms of this enactment. It applies to vehicles used in the conveyance of any goods whatever which may be liable to forfeiture under the Customs Acts. Accordingly, if the fertilisers which were conveyed into Eire by means of the respondent's horse and cart had become deemed to be prohibited goods and liable to forfeiture under the provisions of the Act of 1939 I am satisfied that the horse and cart also became liable to forfeiture. The forfeiture provision in section 202 would operate notwithstanding the respondent's

complete innocence in regard to the transaction (*Lord Advocate v. Crookshanks* (1). I am, therefore, of opinion that the question submitted by the learned Recorder in the case stated should be answered in the negative.

Appeal dismissed.

Solicitor for the appellant : *Chief Crown Solicitor.*
Solicitor for the respondent : *Hugh C. O'Doherty.*

J. McC.

(1) (1888) 15 R. 995.

C.A. 1949.

BRENNAN AND ANOTHER v. GALE AND ANOTHER. (1)

May 3, 4, 5, 6, 10, 11; July 11

Damages—Fatal accident—Probability of pecuniary benefit—Measure of computation—Power of appellate court to set aside award of damages as excessive—Fatal Accidents Act, 1846 (9 & 10 *Vict.*, *c.* 93), *s.* 2.

In computing the amount to be awarded in actions under the Fatal Accidents Act, 1846, the task of the court or jury is to estimate as best they can a capital sum which will represent a fair compensation for the loss of the actual pecuniary benefit which the dependents might reasonably have expected to enjoy had the deceased not been killed.

The usual method is to settle on a basic annual figure by taking the deceased's actual earnings and subtracting such amount as was required for his own personal and living expenses, and then to multiply this figure by such a number of years' purchase as will be thought to take into account all the probabilities and chances which should be taken into account in fixing fair compensation, including the probable duration of the earning life of the deceased, the probable duration of the life of the dependants, and the possibility of increased earnings or disablement or unemployment. There is no yardstick by which the number of years' purchase can be measured, though the figure of sixteen years' purchase adopted by the Court of Appeal in *Johnson v. Hill* (1945) 61 T.L.R. 398 will approach the upper limit.

In the present case the deceased who was a life director of a limited company had entered into agreements by which he undertook to devote his full time to the business for a period of twenty years at a salary and bonus, the bonus being calculated as a percentage of the net profits of the company after certain deductions, and he had further agreed that seventy-five per cent. of this bonus (after deduction for tax) should be applied in purchasing ordinary shares in the company from the trustees of a deceased shareholder. It was *held* that the jury might properly have regard to the earnings of the company subsequent to the death of the deceased in order to ascertain what benefits he would have been entitled to had he lived, and also to consider that in that event he would have continued to acquire a substantial shareholding in the company under the agreements before mentioned.

Observations on the powers of an appellate court to set aside a jury's assessment of damages.

APPEAL against judgment entered for the plaintiffs by Porter L.J. at the trial of an action with a special jury of the City of Belfast.

(1) In the Court of Appeal before Andrews L.C.J. and Black L.J.

In this action the plaintiffs as personal representatives of Henry F. Brennan, deceased, claimed damages under the Fatal Accidents Acts, 1846 to 1908, and also under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, for loss and damage to the estate of the deceased, against the two defendants alleging negligence on the part of each in the driving, management and control of two motor vehicles whereby the said Henry F. Brennan was killed. The material facts were that on the 12th March, 1942, the deceased was driving in his car on the highway when a U.S.A. military lorry driven by the defendant Gale was approaching from the opposite direction. The defendant Noblett who was driving a car in the same direction as the deceased drew out in order to pass an omnibus which was immediately behind the deceased's car, and the U.S.A. military lorry thereupon swerved and collided with the deceased's car killing the deceased and two passengers.

The jury found that Noblett was not guilty of negligence, but that Gale was guilty of negligence and that Gale's share of responsibility for the accident was 100 per cent., and they awarded the plaintiffs £533 15*s.* 6*d.* under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937 (of which £33 15*s.* 6*d.* represented funeral expenses) and £19,000 under the Fatal Accidents Acts, 1846 to 1908, of which they apportioned £15,000 to the widow and £2,000 each to the two daughters of the deceased.

The defendant Gale appealed asking that the verdict be set aside and that judgment be entered for Gale, or alternatively that a new trial be ordered. The grounds of appeal were, *inter alia*, that the damages awarded were excessive.

The Court of Appeal dismissed the appeal, and the case is reported only on the question whether the damages awarded by the jury were excessive. The facts of the case in so far as they relate to the matter of damages are to be found in the judgment of Black L.J.

Nicholson K.C., *Harrison K.C.* and *Blair* for the appellant Gale.

C.A. 1949.

BRENNAN AND ANOTHER v. GALE AND ANOTHER.

Sheil K.C., *Hanna K.C.* and *Lowry* for the respondents Brennan and Browne, personal representatives of Henry F. Brennan, deceased.

Topping K.C., *Jones K.C.* and *J. A. Brown* for the respondent Noblett.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J., after stating his reasons for dismissing the appeal on the issue of liability, continued :—

The only matter which remains to be considered, and, indeed, the only matter which throughout the hearing in our court caused me any difficulty is the amount of damages awarded by the jury, which, the trial judge reports, were larger, but not very much larger, than he would have given, and not unreasonable.

When listening to the arguments of counsel I formed the opinion, from which I have not since departed, that the amount awarded by the jury was generous and somewhat in excess of the sum which I myself would have allowed ; but in my opinion this is not a sufficient reason to justify this court in setting aside the jury's assessment. *Praed v. Graham* (1), and *Taff Vale Co. v. Jenkins* (2). In endeavouring to arrive at a finding as to the sum which should have been awarded by way of damages in the present case one is confronted with so many contingencies and with so many speculative and uncertain factors that it is utterly impossible to speak with any degree of confidence, and to say that one's own estimate is right, and that the twelve special jurors, who earned the commendation of the learned trial judge as keen and intelligent men of affairs, who followed the evidence and the speeches of counsel with the closest attention, must have been wrong. I am unable to say that they must have acted contrary to settled principle. The evidence left much that was vague and indefinite as to the deceased's net spending income, and as to the proportion thereof which represented his wife's and his children's degree of dependency. There was also a

(1) (1890) 24 Q.B.D. 53, 55. (2) [1913] A.C. 1, 7.

total absence of evidence from any accountancy or insurance witness as to the individual and joint expectancy of life of the deceased and of his wife. The agreement of the 23rd August, 1939, differentiates this case from all reported authorities, and it must have added materially to the jury's difficulties. Undoubtedly, it leaves the matter of damages a much more open question than it would otherwise have been.

It is not my intention to refer in detail to the relevant evidence on the issue of damages, which indeed would be to undertake a wholly unnecessary task having regard to the judgment of my colleague, Lord Justice Black, which he is about to deliver and which I have had an opportunity of reading. With it I entirely agree. Accordingly, for the reasons which I have indicated above, and for those which he has so much more fully and clearly stated, I am of the opinion that the verdict of the jury should not be disturbed, and that the motion to this court for a new trial should be refused with costs.

BLACK L.J., after stating reasons for dismissing the appeal on the issue of liability, continued :— BLACK L.J.

I pass now to what seems to be the much more difficult question, the question whether this court should interfere with the damages awarded by the jury on the ground that those damages are excessive.

The principles upon which damages should be measured in an action brought under Lord Campbell's Act are not in doubt. Section 2 of the Act provides that in every such action the jury may give such damages as they may think proportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit the action shall be brought. The measure of the damages which the jury may award under this section is the pecuniary loss suffered by the dependants by reason of the death. In computing the amount to be awarded to a widow or children the jury are not entitled to take into consideration mental suffering or loss of society. They cannot, as in Scotland, allow anything by way of solatium. Their task is to estimate as best they can a capital sum or sums which will represent a fair

C.A. 1949.

BRENNAN AND ANOTHER v. GALE AND ANOTHER.

BLACK L.J.

compensation for the loss of the actual pecuniary benefit which the dependants might reasonably have expected to enjoy if the deceased had not been killed. Apart from certain statutory exceptions which do not arise for consideration in the present case they must, in calculating the damages, give credit for any pecuniary benefit which the several dependants have received in consequence of the death, and must set off the value of that benefit against the loss which those dependants have suffered. They are not, however, tied down to the actual amounts by which the dependants chanced to be benefiting at the date of the death. They are entitled to have regard to the probabilities of the future and to take into account any increase of benefits which on the evidence they may be justified in thinking would have accrued to the dependants if the deceased had lived. Although the loss sustained by each individual dependant must be assessed separately, since each individual's claim is in respect of his own loss and is not to be a proportion of a limited sum, (*Pym v. Great Northern Railway Co.* (1), *Avery v. London and North Eastern Railway Co.* (2)) yet in cases where the dependants are the widow and children of the deceased it is quite usual in practice to fix a lump sum as representing the loss which the family as a whole have sustained by the death, and then to apportion it among the dependants. In such cases this course is not likely to lead to any error or hardship : (*Williamson v. Thornycroft & Co. Ltd.* (3)). Many instances might be cited from the reports where it has been adopted without question, and indeed it has received the express approval of the Judicial Committee : (*Royal Trust Co. v. Canadian Pacific Railway Co.* (4)).

When damages which have been assessed by a jury are challenged on the ground that the amount is excessive the duty of an appellate court has been laid down in a number of well known cases, which are conveniently collected in the judgment of the present Lord Chief Justice in *Greene v. Boyle* (5), a decision of

(1) (1863) 4. B. & S. 396.
(2) [1938] A.C. 606.
(3) [1940] 2 K.B. 658.
(4) (1922) 38 T.L.R. 899.
(5) [1937] 3 Ir. Jur. 3.

this court. The jury's assessment will not be set aside merely because it is in excess of the amount which the court itself would have fixed. It will be set aside only if the damages awarded are so large that twelve sensible jurors could not reasonably have awarded them, or if the court is satisfied that the jury have taken into account matters which they ought not to have taken into account or have disregarded matters which they ought to have taken into account, or, as it has been put in the Irish cases, if the court cannot find any reasonable proportion between the amount awarded and the loss sustained. As Lord Wright says in *Davies v. Powell Duffryn Associated Collieries Ltd.* (1) : " the scale must go down heavily against " the figure attacked if the appellate court is to " interfere." It follows that where a jury's award of damages is attacked on the ground that it is excessive it is the duty of the court, in considering whether the amount can be justified as being within what has been called the reasonable limits of the jury's discretion, to accept the view of the facts which is most favourable to the plaintiff.

The method of arriving at the damages in a simple case under Lord Campbell's Act is set out by Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd.* (1). After observing that it is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities, Lord Wright goes on to say : " The starting point is the amount of wages " which the deceased was earning, the ascertainment " of which to some extent may depend on the regularity " of his employment. Then there is an estimate of " how much was required or expended for his own " personal and living expenses. The balance will give " a datum or basic figure which will generally be " turned into a lump sum by taking a certain number " of years' purchase. That sum, however, has to be " taxed down by having due regard to uncertainties, " for instance, that the widow might have again married " and thus ceased to be dependant, and other like " matters of speculation and doubt."

(1) [1942] A.C. 601, 617.

C.A. 1949. BRENNAN AND ANOTHER v. GALE AND ANOTHER. BLACK L.J.

This is a method which can be readily followed in the case of a weekly wage earner who leaves a widow and a family of young children, but it is obviously not capable of providing a simple and complete solution in a complicated case such as the present one. And even in cases where the method is appropriate difficulties arise in its application. The first difficulty is to determine what Lord Wright calls the datum or basic figure. This has to be arrived at as best one can on the evidence. The next difficulty, and a much more serious one, is to settle the number of years' purchase by which this annual figure is to be converted into a lump sum. Lord Wright speaks as if the annual figure is converted into a lump sum by taking a number of years' purchase, and this lump sum is subsequently reduced to allow for all the various uncertainties and matters of speculation and doubt. In practice, however, I think it is much more usual after settling on the basic annual figure to apply to it as a multiplier such a number of years' purchase as will be thought to take into account all the doubts and uncertainties which point to a reduction in the sum to be awarded. What this appropriate multiplier may be in any individual case must depend on the particular circumstances of that case. But there is no real yardstick by which the number of years' purchase can be measured. One has to take into account the probable duration of the earning life of the deceased and also the probable duration of life of the widow, the possibilities of increased earnings on the one hand and of disablement or unemployment on the other, and all the other probabilities and chances which should be taken into consideration in endeavouring to fix a fair compensation for the pecuniary loss. The amounts which have been allowed in reported cases follow no rigid rule. In *Davies v. Powell Duffryn Associated Collieries Ltd.* (1), dealing with the case of a man of forty-two years of age who left a widow and three dependent children, the House of Lords increased an amount of £250 fixed by the trial judge to £750. Lord Wright speaks of the £250 as " based on some-

(1) [1942] A.C. 601.

"thing like three and a half years' purchase of the "basic figure." The £750 may therefore be regarded as based on ten and a half years' purchase. In the more recent case of *Johnson v. Hill* (1), where the deceased was thirty-nine years of age and one of the questions in issue was whether the prospect of his dependants receiving a pension from the Crown by reason of his death should be taken into consideration, the English Court of Appeal, in the course of their judgment, first fixed an amount which they considered would have been a fair and reasonable sum to award if no allowance fell to be made in respect of what might be received as pension. On the facts set out in the report this sum appears to have amounted to about sixteen years' purchase of the value of the pecuniary benefit which the dependants would have received from the deceased in the course of a year. I merely refer to these cases as instances of the number of years' purchase which have commended themselves to appellate tribunals. The number adopted by individual judges and juries in particular cases will be found to vary greatly; juries have, no doubt, tended on the whole to be more liberal than judges trying cases without a jury. But I think the figure of sixteen years purchase, which appears to have been the number fixed by the Court of Appeal in *Johnson v. Hill* (1) will approach the upper limit of any calculation of damages which has received the sanction of an appellate court.

The present case is by no means a simple one. The deceased, Henry F. Brennan, was at the time of his death on the 12th March, 1942, aged fifty-two. His wife, Mrs. Ella Frances Brennan, was then aged about fifty, and he had two daughters, Moyra, who at the time of her father's death was aged eighteen, and Sheila, who was them almost fifteen. Moyra has recently married in September, 1948. Mr. Brennan had been engaged in business with Howden's Limited, a company carrying on business as coal merchants and shipowners at Larne. At the date of the agreement of the 7th September, 1939, to which I shall have

(1) (1945) 61 T.L.R. 398.

C.A. 1949.

BRENNAN AND ANOTHER v. GALE AND ANOTHER.

BLACK L.J.

presently to refer, he was a life director of the Company. I am not sure what his salary had been prior to this date. It is in evidence that in 1938 his income was £1,640, and that is said to have been an average pre-war year. So that Mr. Brennan, though then very comfortably off, could not have been regarded as a very rich man. The principal shareholder in the Company had been a Mr. William John Reid Harbinson, who died on the 28th September, 1933. In 1939 the issued capital of the Company consisted of 61,000 ordinary shares of £1 each, and of these shares Mr. Harbinson's trustees at the date of the agreement of 7th September, 1939, held 52,498. In June, 1939, the capital of the Company was increased by the creation of 24,000 five per cent. redeemable preference shares, which were issued to the ordinary shareholders in the proportion of two preference shares for every five ordinary shares held by them and were credited as fully paid up by a capitalization of £24,400 of the undivided profits of the Company. Mr. Brennan was then a holder of 500 ordinary shares and accordingly received 200 of these new preference shares.

The trustees of Mr. William John Reid Harbinson were apparently minded to realize their holding of ordinary shares in the Company, and accordingly on the 7th September, 1939, they entered into an agreement with the three life directors of the Company, a Mr. Harry Taylor Browne, Mr. Brennan, and a Mr. William Kenneth Harbinson. Mr. Brennan had by an agreement dated the 23rd August, 1939, agreed to devote his full time to the business for a period of twenty years at a salary of £800 a year and a bonus. By the first clause of the agreement of 7th September, 1939, each of the life directors agreed to transfer to the trustees the preference shares which had been issued to him in exchange for a transfer by the trustees to him of an equivalent number of ordinary shares. By the third and fourth clauses of the agreement it was provided that eighty per cent. of the excess of the net profits of the company in each year over and above £3,050 (representing three per cent. on the ordinary shares and five per cent. on the preference

shares) should be paid to the life directors jointly as a bonus, and should continue to be so paid so long as any one of the life directors remained in office. And by the fifth clause of the agreement it was provided that 75 per cent. of the bonus, after providing for (*a*) income tax on the bonus (taken as divisible equally between the life directors) and (*b*) surtax or any other additional tax on income on the whole of the salary and share of bonus of each of the life directors at the rates which would be payable if such salary and bonus were his sole source of income, should be applied in purchasing from the trustees ordinary shares of the company. Clause 10 of the agreement provided that it should have effect as from the 1st April, 1938, and clause 12 provided that so long as the agreement should remain in force and the bonus should be applied in accordance with clause 5, the trustees would not sell any of their ordinary shares otherwise than to the life directors or such of them as should for the time being remain in office.

Although Mr. Brennan's death took place in March, 1942, the action was not tried until November, 1948. Accordingly, evidence was available not only as regards the bonus which had become payable to Mr. Brennan during the years before his death, but also as to the amount of the bonus which had become distributable in the years subsequent to his death. As the jury were entitled to take into account Mr. Brennan's financial prospects in the business at the time of his death they were clearly entitled to have regard to the sums which in fact became available for distribution by way of bonus during the years after his death, and to the benefit of which he would have become entitled if he had lived (*Williamson v. Thornycroft* (1)). The agreement of the 7th September, 1939, was to take effect from the 1st April, 1938. It had, accordingly, been in operation for almost four years at the time of Mr. Brennan's death. For the first year (to 1939) Mr. Brennan's salary and bonus under the agreements (before deduction of tax) amounted to £3,087, for the next year (1940) to £5,290, for 1941 £4,080, and for

(1) [1940] 2 K.B. 658.

C.A. 1949.

BRENNAN AND ANOTHER v. GALE AND ANOTHER.

BLACK L.J.

1942 £4,470. If he had lived his salary and bonus would have been for 1943 £4,866, for 1944 £5,000, for 1945 £6,000, for 1946 £6,500, for 1947 £5,100, and for 1948 £5,400. From these figures I think it was within the rights of the jury to infer (if they thought fit) that the trend of the company's profits was to increase. We do not, of course, know what figure the jury did adopt, but I think it was clearly open to them, upon this material, to consider that Mr. Brennan's gross annual income from salary and bonus might reasonably be expected to amount on an average to £5,000 a year, or perhaps £5,500 a year, or possibly, if the jury took a very optimistic view, to even somewhat more. Unfortunately no evidence was given by either side as to what Mr. Brennan's financial position in regard to net income would have been if he had lived till 1948, and had enjoyed his salary and share of bonus up to that year. One would have welcomed a table prepared by an accountant showing for various assumed annual amounts of salary and bonus (e.g., £3,000, £3,500, £4,000, £4,500, £5,000, £5,500, and £6,000) : (*a*) the amount available to Mr. Brennan as free spending income after deduction of tax and (*b*) the amount which, under the agreement of 7th September, 1939, would fall to be applied to the purchase of ordinary shares in the company. It is to be noted that clause 5 of the agreement, in prescribing the calculation to be made in order to determine the amount derived from the bonus which was to be applied each year in the purchase from the trustees of ordinary shares, did not provide for the deduction of the income tax payable in respect of that portion of Mr. Brennan's income which consisted of the £800 salary. This amount of income tax would, therefore, have to be deducted from the £800 salary and the twenty-five per cent. of bonus, which he was entitled to retain, in order to find his net income available for spending. In the absence of such evidence the jury had to make the best estimate that they could. Making a rough calculation on the assumption of a year's salary and bonus amounting in the aggregate to £5,500 it would appear that in such a year, with income tax and surtax at their present

rates, Mr. Brennan would have had, under the provisions of the agreement of 7th September, 1939, to apply between £1,400 and £1,500 to the purchase of ordinary shares from the trustees, and after providing for payment of income tax on his £800 salary would have had left out of the £5,500 a net amount available for spending of between £1,000 and £1,100. Though we have no information as to what figure the jury adopted I think we may legitimately assume that they may, perhaps, have worked on this figure of £5,500 as an estimate of Mr. Brennan's probable average earnings by way of salary and bonus.

The jury awarded the plaintiffs £533 15*s.* 6*d.* as damages under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, of which the £33 15*s.* 6*d.* represented the amount of the funeral expenses of the deceased. Under the Fatal Accidents Acts they awarded £19,000, of which they apportioned £15,000 to the widow and £2,000 to each of the daughters. Inasmuch as damages awarded under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, must be taken into account in assessing damages under the Fatal Accidents Act, *Davies v. Powell Duffryn Associated Collieries Ltd.* (1), the question is whether the jury's award of £19,500 can be upheld as an estimate of the pecuniary loss sustained by the widow and daughters by reason of Mr. Brennan's death.

One cannot find an easy solution of this problem by adopting to the somewhat complicated and unusual facts of the present case the simple method of calculation outlined by Lord Wright in *Davies' case* (1). If we had only had to consider what I have called Mr. Brennan's net free spending income we might, perhaps, have followed that method, albeit with a certain amount of caution in view of the fact that one might expect to find differences of allocation of earnings in a household such as Lord Wright was considering, and in a household such as Mr. Brennan's. And in the present case no serious effort appears to have been made either on the part of the plaintiffs or on the part of the

(1) [1942] A.C. 601.

C.A. 1949.

BRENNAN AND ANOTHER v. GALE AND ANOTHER.

BLACK L.J.

defendants to elicit what proportion of Mr. Brennan's free spending income could be regarded as being spent upon himself, and what proportion went for the benefit of the family. Mrs. Brennan said that they had a happy comfortable home according to their means, that she and her husband had a common purse and a joint bank account, that he drew on this account for his own requirements and that the housekeeping money came out of this money. It was also given in evidence that in July, 1940, less than two years before his death, Mr. Brennan had given each of his daughters £1,008 15*s.* 0*d.* I take it that the picture that the jury got from the evidence was of an ordinary North of Ireland middle class family living happily together in an unostentatious manner comfortably within their means. And the evidence in regard to Mr. Brennan himself was that he was a hardworking business man, happy in his work and in his home life, who devoted his whole time to his business and had won his way nearly to the top. The gifts which he had made to his daughters suggest that he was not a spendthrift, but that he was a man who fully recognized his duty of providing for his children. By his will which he had made in 1936 he bequeathed all his property to his wife absolutely, and in the event of her predeceasing him to his daughters in equal shares. Taking the view of the family and its circumstances which they might derive from this evidence, if the jury had had only to take into consideration Mr. Brennan's free spending income from the business, of £1,000 or £1,100 they might, perhaps, have come to the conclusion that the family's loss in respect of the benefit derived by them from this income might be assessed at anything up to (say) £700 a year, remembering, of course, that any savings which Mr. Brennan effected would ultimately come to his wife or children under his will if they survived him. What multiplier ought to be applied to this amount in pursuance of Lord Wright's method it is difficult to say. Mr. Brennan was older than the deceased men in *Davies' case* (1) and in *Johnson v. Hill* (2). On the other hand, the

(1) [1942] A.C. 601. (2) (1945) 61 T.L.R. 398.

evidence suggests that he was a man in excellent health. Mrs. Brennan says that he had had a doctor once since 1920. And a jury might well consider that by the nature of his occupation he could be regarded as having a substantially higher expectation of working life than a man engaged in manual labour. Ten years' purchase of £700 a year would amount to £7,000, twelve years' purchase to £8,400, fourteen years' purchase to £9,800.

So far with regard to Mr. Brennan's free spending income from the business. I turn now to the portion of his income which, under the agreement of 7th September, 1939, had to be devoted to the purchase of ordinary shares from the trustees of Mr. William John Reid Harbinson. According to my calculations in a year in which his salary and bonus amounted to £5,500 over £1,400 of this would have had to be applied to the purchase by him of ordinary shares, and a similar sum would have had to be applied by each of his co-life directors to the same purpose. Unfortunately the precise evidence which one would have wished to have is here again missing. Evidence ought surely to have been adduced as to the number of ordinary shares of the company held by the trustees and by Mr. Brennan's co-directors, both at the date of Mr. Brennan's death and at the date of the trial of the action in November, 1948. All that we know is that the trustees held 52,498 ordinary shares at the date of the agreement of the 7th September, 1939, and that Mr. Brennan was entitled to 6,200 at the date of his death. It would appear that the shares to be acquired from the trustees out of the bonus payable to the life directors were being purchased at their par value, £1 a share. If all three life directors had lived, and if each was acquiring on an average 1,400 shares a year from the trustees by means of his bonus it would follow that they would have acquired the whole of the trustees' holding of ordinary shares in about ten years from the date of Mr. Brennan's death, or possibly less. Accordingly, I think the jury were entitled to consider that if Mr. Brennan had lived he could have looked forward to becoming, along with his two co-directors the owners of

C.A. 1949.

BRENNAN AND ANOTHER v. GALE AND ANOTHER.

BLACK L.J.

approximately ninety per cent. of the ordinary shareholding of the company about 1952. Mr. Brennan would then have been in an enviable position, both as regards capital and income. As regards capital, he would have been the owner of about 18,000 £1 shares. The balance sheets of the company as at the 31st March, 1942, and the 31st March, 1948, were in evidence. These balance sheets—especially that of the 31st March, 1948—disclose what prima facie appears to be a strong financial position. The company has substantial reserves, and the issued capital seems to be amply covered by the excess of assets over liabilities. No doubt each of the life directors, if Mr. Brennan had lived, would only have had a minority shareholding. But they appear to have worked together in amity, and if they were well advised they would have entered into some arrangement by which on the death of any one of them his representatives would have received the fair value of his shareholding. As regards income, Mr. Brennan's position would have been not less enviable. He would have become free from the obligation to devote the major share of his bonus to the purchase of shares. His income from the Company—on the basis that its earning capacity continued—would have been £5,000 or £6,000 a year, and after payment of income tax and sur tax he would have been free to apply the balance as he wished.

No doubt all this was contingent on Mr. Brennan surviving. And Mrs. Brennan's prospect of sharing in the benefit of this prosperity was contingent on her surviving too. Here again no evidence, such as one might have expected, was given in regard to their expectations of life. The jury, however, had been given to understand that Mr. Brennan was a man who enjoyed excellent health, and they were entitled to assume that he had many years of life before him. Mrs. Brennan they saw for themselves in the witness box. And be it remembered that the action was not tried till six and a half years after Mr. Brennan's death, within (say) four years of the time when if he had lived all the ordinary shares would have been

acquired from Mr. Harbinson's trustees, and Mr. Brennan would have been in a position to devote his very substantial income from the company to whatever purpose he pleased. Moreover, even if some calamity had happened to Mrs. Brennan her daughters would, in the ordinary course of nature and under the provisions of Mr. Brennan's will, have become entitled to his estate upon his death. I think one can infer from the decision of the English Court of Appeal in *Williamson v. Thornycroft* (1) that this is a consideration which should not be left wholly out of account.

How were the jury to assess as at Mr. Brennan's death the loss which Mrs. Brennan and her daughters sustained through Mr. Brennan having been killed in 1942, and of having thereby been deprived of the chance of living long enough to attain this very substantial financial position? It is hard to suggest any particular method of calculation as the one which they ought to have applied. If Mr. Brennan and Mrs. Brennan had both lived to the Psalmist's alloted span they would, in all probability, have been in enjoyment of a very large income from the time when they were about sixty-two years of age. Moreover, Mr. Brennan would have been in possession of a valuable interest in Howden's Limited which, unless for some reason he altered his will, would have passed to his wife or daughters upon his death. The value of these prospects would depend partly on the jury's view of Mr. and Mrs. Brennan's expectation of life. And having formed a view as to the benefits which Mrs. Brennan and the children, after taking into account and giving due weight to all possibilities and contingencies, might reasonably expect to enjoy, it was their task to estimate what would be a fair compensation at the time of Mr. Brennan's death for the prospective loss of these benefits which would not at best accrue until many years later. One would infer that in awarding £19,500 they probably regarded the loss of the prospect of these great benefits as calling for rather a larger measure of compensation than the family's more immediate loss through the ceasing of

(1) [1940] 2 K.B. 658.

C.A. 1949.

BRENNAN AND ANOTHER v. GALE AND ANOTHER.

BLACK L.J.

that part of Mr. Brennan's income from the company which I have called his net spending income. And it is perhaps not without significance to note that if we assume the family's loss under this latter head to be £700 a year (in my view a liberal estimate) the amount which Mr. Brennan was setting aside each year to purchase these prospects of future benefit was approximately twice as much.

The matter was one for the jury. No objection was taken to the learned Lord Justice's charge on the question of damages, except to the fact that he told the jury that Brennan could look forward to a greatly increased income. This objection may have been intended to mean that the jury ought to have been told to disregard the amount distributable as bonus in the years subsequent to Mr. Brennan's death. If this was the point sought to be made the objection was unsustainable. It may, however, have meant that the Lord Justice allowed the jury to learn his own opinion. This he was clearly entitled to do provided that he did not suggest that they should substitute his view for their own. He reports that the jury were, in his opinion, very well qualified to form an opinion of what Brennan's income was likely to be if he had survived, and says that what he told them was that he thought Brennan could have looked forward to a greatly increased income, but that that was a matter on which the jury should make up their own minds irrespective of what he thought. The Lord Justice informs us that the jury, for the most part, consisted of keen and intelligent men of affairs. He says he thinks the amount awarded for damages was larger but not very much larger than he would have given, and that having regard to Brennan's position and prospects and the value of money the amount is not unreasonable. I, too, think that the jury's award was a distinctly generous one, and that they assessed the damages at a larger sum than I personally would have done. But I cannot say that the amount is so large as not to bear any reasonable proportion to the pecuniary loss which Mr. Brennan's dependants have suffered by reason of his death, or that the amount is such that

twelve sensible men might not reasonably have arrived at it or that it indicates that the jury must have taken into account matters which they ought not to have taken into account or that they must have disregarded matters which they ought to have taken into account. In coming to this conclusion I have not left out of account the fact that Mr. Brennan left an estate valued at slightly more than £5,000. In discussing the loss of income occasioned by Mr. Brennan's death I deliberately disregarded his income from this estate, inasmuch as the benefit of this investment income will pass to Mrs. Brennan under his will. The fact that she receives this benefit as a consequence of Mr. Brennan's death has, of course, to be taken into consideration, and the value of the benefit must be deducted in calculating the amount of her loss. This does not necessarily mean that the whole £5,000 should be deducted. Mrs. Brennan and her children would presumably have received some benefit from this investment income if Mr. Brennan had lived. Moreover if Mr. Brennan had not met his death in March, 1942, but had, nevertheless, at some subsequent time predeceased his wife without altering his will, Mrs. Brennan would then have become entitled to this estate. These are factors which must be taken into account in fixing the amount by which Mrs. Brennan's pecuniary loss is diminished by reason of the benefit received by her under her husband's will. It is to be observed that the largest item in Mr. Brennan's estate was his shares in the company, which were valued for Estate Duty purposes at 10*s.* 0*d.* a share. I think this valuation was probably right. Under the arrangement embodied in the agreement of the 7th September, 1939, a dividend of only three per cent. was being paid on these shares. If Mr. Brennan had lived he and his co-directors would ultimately have become practically equal partners in the business, and his interest in the company could then be regarded as having a value equal to at least the par value of his shares. But Mrs. Brennan could never hope to attain this position. After Mr. Brennan's death she was in the position of a minority shareholder in a

C.A. 1949.

BRENNAN AND ANOTHER v. GALE AND ANOTHER.

BLACK L.J.

private company, neither holding nor sharing any control, with the dividend on her shares limited for certainly ten years—and indeed probably after that indefinitely—to a rate of three per cent. Even taking into account the value of Mr. Brennan's estate to which Mrs. Brennan became entitled under his will, I do not think that the jury's estimate of the dependant's loss—an estimate which from the very unusual nature of the case was necessarily bound to be a highly speculative one—is such that upon the principles laid down in the authorities an appellate tribunal would be justified in setting it aside.

Appeal dismissed.

Solicitor for the appellant Gale: *R. A. Corscadden.*
Solicitor for the respondents Brennan and Browne: *H. J. Catchpole.*
Solicitors for the respondent Noblett: *C. & H.* Jefferson.

J. McC.

INDEX

ACQUIESCENCE—RECTIFICATION49
See FAMILY ARRANGEMENT.

ADMINISTRATION—DEATH OF EXECUTOR INTESTATE—*Application by representative of deceased beneficiary for administration with will annexed de bonis non—Jurisdiction of court—Probates and Letters of Administration Act (Ireland)*, 1857 (20 & 21 *Vict., c.* 79), *s.* 78. The jurisdiction of the court under s. 78 of the Probates and Letters of Administration Act (Ireland), 1857, is limited to cases in which the applicant is able to bring his case within one or other of the alternatives therein specified, and there is no inherent jurisdiction in the court which can be exercised merely for the protection of assets. Accordingly, where a testator left a will with a duly appointed executrix who extracted probate and thereafter died intestate it was *held* that the court would not give liberty to apply for a general grant with the will annexed *de bonis non* to an applicant who averred that as administratrix and universal devisee and legatee of a beneficiary named in the testator's will she was entitled to a house and other property standing in the testator's name as registered owner. The court, however made an order giving the applicant liberty to apply for a grant with the will annexed *de bonis non* expressly limited in terms to that part of the testator's property to which the applicant was entitled. *In the Goods of Hampton Robinson.* .. .. .. [K.B.D. 150

CASES—
Johnson v. Hill (1945) 61 T.L.R. 398 discussed 178
See DAMAGES.
Whittall v. Kirby [1947] K.B. 194 dictum of Goddard L.C.J. examined and explained .. 19
See MOTOR CAR.
Cooke v. Cooke [1948] N.I. 46 applied 126
See DIVORCE.

CONDONATION 126
See DIVORCE.

CONTRIBUTORY NEGLIGENCE 134
See NEGLIGENCE.

CUSTOMS 155
See REVENUE.

DAMAGES—FATAL ACCIDENT—*Probability of pecuniary benefit—Measure of computation—Power of appellate court to set aside award of damages as excessive—Fatal Accidents Act*, 1846 (9 & 10 *Vict., c.* 93), *s.* 2. In computing the amount to be awarded in actions under the Fatal Accidents Act 1846, the task of the court or jury is to estimate as best they can a capital sum which will represent a fair compensation for the loss of the actual pecuniary benefit which the dependants might reasonably have expected to enjoy had the deceased not been killed. The usual method is to settle on a basic annual figure by taking the deceased's actual earnings and subtracting such amount as was required for his own personal and living expenses, and then to multiply this figure by such a number of years' purchase as will be thought to take into account all the probabilities and chances which should be taken into account in fixing fair compensation, including the probable duration of the earning life of the deceased, the probable duration of the life of the dependants, the possibility of increased earnings or disablement or unemployment. There is no yardstick by which the number of years' purchase can be measured, though the figure of sixteen years' purchase adopted by the Court of Appeal in *Johnson v. Hill* (1945) 61 T.L.R. 398 will approach the upper limit. In the present case the deceased who was a life director of a limited company had entered into agreements by which he undertook to devote his full time to the business for a period of twenty years at a salary and bonus, the bonus being calculated as a percentage of the net profits of the company after certain deductions, and he had further agreed that seventy-five per cent. of this

bonus (after deduction for tax) should be applied in purchasing ordinary shares in the company from the trustees of a deceased shareholder. It was *held* that the jury might properly have regard to the earnings of the company subsequent to the death of the deceased in order to ascertain what benefits he would have been entitled to had he lived, and also to consider that in that event he would have continued to acquire a substantial shareholding in the company under the agreements before mentioned. Observations on the powers of an appellate court to set aside a jury's assessment of damages. *Brennan and another v. Gale and another.* [C.A. 178

DIVORCE—CONDONED ADULTERY—*Revival by subsequent conduct inconsistent with matrimonial duties—Practice—Condonation and revival not pleaded—R.S.C. Order lxx, r.* 4. A husband's association with another woman in a manner inconsistent with the performance of his ordinary matrimonial duties towards his wife is a matrimonial offence which may revive condoned adultery. *Cooke v. Cooke* [1948] N.I. 46 applied. R.S.C. Order lxx, r. 4, criticised in that it does not require either an admission of condonation of adultery nor an allegation of revival to be pleaded in the petition. *Gardiner v. Gardiner.* .. .. .. [K.B.D. 126

EMERGENCY LEGISLATION—CONTROL OF BUILDING OPERATIONS—*Emergency Legislation—Control of Building Operations—Works unlawfully undertaken without licence—Power of court to grant mandatory injunction—Defence (General) Regulations*, 1939 (*S. R. & O.*, 1939, *No.* 927), *reg.* 56A. Regulation 56A of the Defence (General) Regulations, 1939, which makes unlawful, subject to certain exceptions, the carrying out of any work done in the construction, reconstruction, etc., of a building without a licence therefor granted by the Minister does not make it a continuing offence to retain or continue in enjoyment of work which has been unlawfully done without licence. Accordingly where a defendant was undertaking the reconstruction of a building in breach of the regulation the court granted an injunction to restrain him from carrying out further work, but refused a mandatory injunction to compel him to demolish such work as has already been carried out. *Att.-Gen. for Northern Ireland v Eastwood.* .. .. .. [ChD. 41

EXECUTOR 150
See ADMINISTRATION.

FAMILY ARRANGEMENT — RESETTLEMENT—*Non-disclosure of forfeiture clause—Rectification—Delay—Acquiescence.* A father and son who were entitled under two settlements as tenant for life in possession and tenant in tail in remainder respectively concurred in a re-settlement on the coming of age of the son, the father bringing into the re-settlement certain lands of which he was seised in fee simple. By the re-settlement the properties comprised therein were limited to the father for life, then to the son for life with divers remainders over including remainders to the son's children in tail. At the instance of the father a forfeiture clause was inserted in the re-settlement by which if any person entitled under the re-settlement as tenant for life or tenant in tail by purchase should become a Roman Catholic or profess that he or she was of the Roman Catholic religion the property should pass under the settlement as if such person were dead without issue. The son was not consulted about this clause and did not know of its insertion, and he executed the re-settlement in ignorance that the clause was contained therein and without professional advice. *Held*, by the Court of Appeal (Andrews L.C.J. and Babington L.J.), affirming the decision of Black J. on this point, that the father stood in a fiduciary relation to the son, and as the forfeiture clause was of such unusual and drastic character it was the father's duty to ensure that an exact and complete disclosure and a proper explanation were given to the son, and as this had not been done the son had acquired a right to have the re-settlement rectified by the deletion of the clause. *Quaere* per Babington L.J. whether the father was not under a misapprehension as to the full effect of the clause and that on this ground also the re-settlement might have been rectified. *Held*, however, by Andrews L.C.J. that as after the events giving rise to a forfeiture had

occurred the son had by a series of unequivocal acts shown a determination to abandon any claim to the property comprised in the re-settlement he was barred by acquiescence from asserting his right to rectification. *Contra* per Babington L.J. on the ground that the true inference to be drawn from the evidence was that the son had not irrevocably accepted the forfeiture clause nor abandoned his right to impeach it. *Held*, further, by Andrews L.C.J., Babington L.J. reserving his opinion on this point, that the son's children who had interests in remainder under the re-settlement had independent rights of action similar to that of the son to have the re-settlement rectified by the deletion of the forfeiture clause, and that such children were not affected by any acquiescence on the part of their father. Decision of Black J. [1948] N.I. 72 affirmed in the result. *McCausland and others v. Young and others* .. .. .. [C.A. 49

FATAL ACCIDENT 178
See DAMAGES.

FORFEITURE 49
See FAMILY ARRANGEMENT AND SETTLEMENT.

HABEAS CORPUS 1
See INFANTS.

INFANT—CUSTODY—*Habeas Corpus —Husband and wife living apart—Wife having left matrimonial home—Conflicting claims of husband and wife—No evidence leading to any preference between them—Rights of father at common law—Paramount right of father to custody—Guardianship of Infants Act*, 1886 (49 & 50 *Vict., c.* 27), *s.* 5. A husband whose wife had left the matrimonial home taking with her the two children of the marriage applied to the court by way of habeas corpus for the custody of the children. There was no evidence to show that either party was unfitted to have the custody of the children or that the welfare of the children would be better served by placing them in the custody of one parent rather than the other. *Held* by the Court of Appeal (Babington and Porter L.JJ. and Black J.), affirming the decision of the Divisional Court of the King's Bench Division (Andrews L.C.J. and Lowry J.) that a father's common law right to the custody of his infant children has not been completely abrogated by the Guardianship of Infants Act, 1886, section 5, for he can be deprived of this right only on proof that he is unfitted to have such custody or that the welfare of the children will be thereby imperilled and accordingly where a wife leaves the matrimonial home and wishes to obtain the custody of the children the onus is on her to make this proof. *In re E. A. W. & M. W., Infants* [K.B.D. 1

——RELIGION—*Parental duty* .. 49
See SETTLEMENT.

INJUNCTION 41
See EMERGENCY LEGISLATION.

INSURANCE 19
See MOTOR CAR.

MOTOR CAR—USER ON ROAD—*Vehicle driven by employee without driving licence—Policy of insurance not covering third-party risks in circumstances — Conviction — Disqualification for holding licence—Steps taken by employer to see that employee had licence —Reasonable belief that licence had been obtained—Special reasons for not imposing disqualification—Motor Vehicles and Road Traffic Act (Northern Ireland)*, 1930 (20 & 21 *Geo.* 5, *c.* 24), *s.* 6 (2). The owner of a motor tractor was convicted under s. 6 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, of causing or permitting his employee to use the tractor on the highway without there being in force in relation to such user such policy of insurance or such security in respect of third-party risks as complied with the requirements of Part II of the Act. The policy of insurance held by the defendant excluded from its cover any driver who did not at the time of driving hold a licence to drive and the employee had no such licence. It was found that the defendant when engaging the employee a fortnight previously had learned that he had no licence, that he thereupon instructed him to obtain a licence and gave him time off and money for this purpose, that he never inquired whether the employee had obtained a licence, but that when he gave the employee instructions to drive the tractor on the occasion in question he believed that a licence had been obtained and that accordingly there was in force a policy of insurance

covering the tractor while being driven by the employee, and that in these circumstances the defendant was not guilty of carelessness. *Held*, by the Court of Appeal (Andrews L.C.J. and Porter L.J.; Babington L.J. dissenting) that these facts disclosed a "special reason" for which the trial court could properly exercise its discretion under s. 6 (2) of the Act not to disqualify the defendant for holding or obtaining a licence. Dictum of Goddard L.C.J. in *Whittall v. Kirby* [1947] K.B. 194, 200 examined and explained. *Kerr v. McNeill* [C.A. 19

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—*Questions submitted to Jury Inconsistent answers—Answer contrary to evidence—"Last" opportunity" rule.* S., when standing in a trailer attached to a vehicle driven by W., the servant of B., was thrown out and injured when the vehicle was driven into an obstacle. In an action for damages for injuries caused by the negligence of W., it was pleaded that the plaintiff was guilty of contributory negligence in that he was standing instead of sitting in the moving trailer. The jury answered questions submitted by the trial judge as follows:—"(1) Was W. guilty of "negligence causing the accident?—"*Yes.*" "(3) Was the plaintiff guilty "of contributory negligence?—*Yes.*" (4) If the plaintiff was guilty of con-"tributory negligence, yet would W. "by the exercise of care and skill have "avoided the accident?—*No.*" "(5) Damages (if any)—£350 (*Three "hundred and fifty pounds sterling*). "We find for—*plaintiff.*" *Held*, by the Court of Appeal (Andrews L.C.J. and Black L.J.), that where the driver of a vehicle becomes aware that a passenger has taken up a precarious position on the vehicle he is under a duty to exercise such additional degree of care as is called for by the passenger's risky position and is appropriate to the occasion; that the only conclusion which could properly be drawn from the evidence was that the fourth question to the jury should have been answered in the affirmative; and, accordingly, that the judgment entered for the defendant must be set aside. *Held*, also, by Andrews L.C.J., that the jury's negative answer to the fourth question was so inconsistent with the fact that they had assessed damages and had included an express finding for the plaintiff, that the court was entitled to set the answer aside on the ground that the jury had manifestly failed to understand the question. Per Andrews L.C.J.: The "last "opportunity" rule has not been wholly abrogated, and it may still be relied upon as a helpful test in determining the issue of liability. The four questions for a jury in a contributory negligence case referred to in *Campbell v. Kelly* [1945] N. I. 70 should continue to be put in all cases in which there is evidence to support them and which fall to be determined under the law which existed before the passing of the Law Reform Act (Northern Ireland), 1947. *Sproule v. Bogle and Williamson* .. .. .. [K.B.D. 134

REVENUE—CUSTOMS—*Export of prohibited goods—Horse and cart used for removal and conveyance of goods—Liability to forfeiture—Customs Consolidation Act*, 1876 (39 & 40 *Vict., c.* 36), *s.* 202—*Import, Export and Customs Powers* (*Defence*) *Act*, 1939 (2 & 3 *Geo.* 6, *c.* 69), *s.* 3 (1). By s. 202 of the Customs Consolidation Act, 1876, "all ships, boats, carriages, or "other conveyances, together with all "horses, and other animals and things "made use of in the importation, "landing, removal, or conveyance of "any uncustomed, prohibited, re-"stricted, or other goods liable to "forfeiture under the Customs Acts "shall be forfeited . . ." A labourer employed by a farmer used the farmer's horse and cart without authority in order to carry from Northern Ireland into Eire by an unapproved road goods which were prohibited goods under the Import, Export and Customs Powers (Defence) Act, 1939. *Held*, by the Court of Appeal (Andrews L.C.J. and Porter L.J.: Black L.J. dissenting) that the words "importation, landing "removal, or conveyance" referred to four different stages in connection with the arrival of goods in the United Kingdom and the disposition of imported goods, and could not be extended to cover the exportation of goods from the United Kingdom, and that accordingly the horse and cart were not liable to forfeiture. *Graham v. Baldrick* .. .. [C.A. 155

ROAD TRAFFIC 19
See MOTOR CAR.

SETTLEMENT—CONDITION SUBSEQUENT—*Forfeiture clause—" Become a " Roman Catholic or profess that he or " she is of the Roman Catholic religion " —Uncertainty—Infant—Parental duty —Public policy.* A condition subsequent in a re-settlement provided that if any person thereby made tenant for life or tenant in tail by purchase should " become a Roman Catholic " or profess that he or she is of the " Roman Catholic religion " then both such person and his issue should forfeit all interest thereunder. It was contended (i) that the condition was void for uncertainty in that the term " Roman Catholic " was ambiguous; that it was not possible to ascertain with certainty how or at what time a person " became " a Roman Catholic, and that it was not certain what acts or conduct would amount to " profess," or whether " religion " meant religious organisation or a system of belief; (ii) that the condition was void as contrary to public policy as tending to fetter the father of any infant entitled under the settlement in discharging his parental duty with regard to the religious instruction of such child. *Held*, by the Court of Appeal (Andrews L.C.J. and Babington L.J.) affirming the decision of Black J. on this point, that the term " Roman " Catholic " was to be interpreted as reasonably understood by ordinary persons and its meaning in this sense was not uncertain; and that whether a person had become a Roman Catholic and whether a person had professed that he or she was of the Roman Catholic religion were questions of fact capable of being understood with certainty and of being ascertained with precision. *Held*, further, by Andrews, L.C.J. that where the choice of religion may involve a forfeiture the court will not hold a beneficiary to a binding choice until he is of age when he can exercise a free and real choice of his own, and accordingly the condition did not interfere with the father's exercise of his right to determine in what religion his children shall be educated. *McCausland and others v. Young and others* .. .. [C.A. 49

STATUTES—
——9 & 10 Vict., c. 93, s. 2 .. 178
See DAMAGES.
——20 & 21 Vict., c. 79, s. 78 .. 150
See ADMINISTRATION.

——39 & 40 Vict., c. 36, s. 202 .. 155
See REVENUE.

——49 & 50 Vict., c. 27, s. 5 .. 1
See INFANTS.

——20 & 21 Geo. 5 (N.I.), c. 24, s. 62 (2) 19
See MOTOR CAR.
——2 & 3 Geo. 6, c. 69, s. 3 (1) .. 155
See REVENUE.

STATUTORY RULES AND ORDERS—
——R.S.C. Orderl xx, r. 4 .. 126
See DIVORCE.

——Defence (General) Regulations, 1939 (S. R. & O., No. 927 of 1939), reg. 56A .. 41
See EMERGENCY LEGISLATION.

WORDS—
——" importation, landing, removal, or conveyance " .. 155
See REVENUE

——" Roman Catholic " .. 49
See SETTLEMENT.